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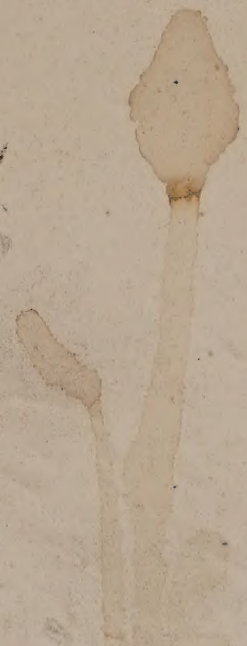

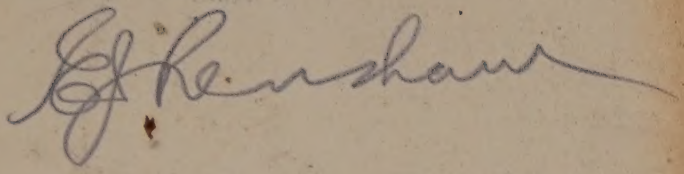

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HANDBOOK

OF THE

LAW OF PARTNERSHIP

GEORGE E. MAYCOCK

By WILLIAM GEORGE

OF THE ST. PAUL BAR

ST. PAUL, MINN.
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1897

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PREFACE.

In laying the following pages before the profession the author is mindful that a distinguished predecessor of his in this line of inquiry has disparaged in advance the efforts of any one who may attempt to reduce the law of partnership to a system of rules. It is with very great diffidence, therefore, that the present work on partnership law is submitted, for its most conspicuous feature is an attempt to work out the analysis of the subject into a complete and consecutive series of general propositions. No one can doubt the value of such an analysis, but the reader must judge for himself what measure of success has crowned the author's efforts.

The aspect of the partnership relation has undergone many changes during the century now closing. These changes have been traced and explained in the text, while, in the notes, the reader has been referred to the leading cases and the best text writers, so that he may, by following the changing methods of interpretation as they appear in the authorities, learn not only what the law of partnership now is, but how it came to have its present status. There has been no attempt to make the citation of cases exhaustive upon well-established propositions, but it is by no means meager, nearly five thousand cases being referred to in different parts of the work. Great pains has been taken in the citation of these cases to have them each exactly support the proposition to which it is cited. Long lists of cases have been avoided, and, as far as possible in a one-volume work on so extensive a subject, the cases have been classified in the notes and the specific points decided have been stated. It is believed that all the leading American and English cases are included. In citing statutes throughout the book, the last general revision in the several states has in each case been consulted.

In gathering material for the text, more or less aid has been received from the pages of Story, Collyer, Parsons, and others, while

very copious use has been made of the great work of Lord Lindley, the natural resort for all investigators into this branch of the law. Acknowledgment must also be made to Mr. William B. Hale of St. Paul, who, by his labor and activity in assisting in the preparation of the work, has earned, even if he does not receive, whatsoever credit the book may reflect upon its author. W. G.

St. Paul, Minn., Feb. 6, 1897.

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HANDBOOK

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LAW OF PARTNERSHIP.

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26. Partnership by Estoppel—Holding Out.

PARTNERSHIP DEFINED.

1. Partnership is the relation existing between persons who have so contracted that the profits of some business enterprise conducted by any or all of them for them all enure to all as co-owners, and are shared accordingly.

The most difficult question involved in a consideration of the law of partnership is the determination of what, in fact, constitutes a partnership. Indeed, some of the best minds that have grappled with the subject have been reluctant to formulate a definition, and the success of those who have overcome this reluctance must have been small to merit the remark of an eminent jurist of to-day that "the various definitions have been approximate rather than exhaustive." [1] The above definition is submitted, therefore, with considerable diffidence.[2]

[1] Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972. A number of definitions are collected in Lindl. Partn. p. 3, of which the following are a few:

Code of Civil Procedure of New York: "Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." Section 1283.

Dixon: "A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit." Dix. Partn. 1.

Kent: "Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent, Comm. 23.

Indian contract act: "Partnership is the relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them." Indian Contract Act, § 239.

Parsons: "Partnership is the combination by two or more persons of capital or labor or skill, for the purpose of business for their common benefit." T. Pars.

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[2] Throughout this book, and in the cases and other books as well, partners are frequently spoken of as joint owners of the profits. The phrase "joint owners," used in this connection, does not mean owners in joint tenancy. Partnership is merely one species of joint ownership. It is as distinct a class as is either of the other forms of joint ownership, viz. joint tenancy, tenancy in common, estates in entirety, and estates in co-parcenary.

Partnerships inter Se and as to Third Persons.

Much of the difficulty involved in stating the essential elements of a partnership arises from an ambiguous use of the term. Thus, it is used to describe the actual relation existing between persons who are really partners as between themselves. This is its only proper sense. But it is also used to describe the relation existing between persons who are not really partners as between themselves, but who are liable to third persons as though they were. Thus, a given state of facts is frequently said to render the individuals involved "partners as to third persons." This is an erroneous use of the term, and very misleading. A partnership does not exist as to third persons when none actually exists between the persons themselves. It is true that a third person may sometimes succeed in subjecting some one to such a liability as would be a partner's when he has really no part in the partnership at all;[3] but the fact remains that the relation depends on what the parties have made it. "Partnership is a relation inter se, and the word cannot in strictness be used except to signify that relation."[4]

Partn. c. 2, § 1. This definition is inaccurate. The word denotes a combination of persons, not a combination of capital.

Pollock: "Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them." Pol. Partn. (3d Ed.) § 4.

Rutherford: "When two or more persons join money or goods or labor, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership." Ruth. Inst. bk. 1, c. 13, § 9.

Story: "Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." Story, Partn. § 2. Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. Cal. Civ. Code, § 2395; Dak. Comp. Laws 1887, § 4027; N. D. Rev. Code 1895, § 4370.

[3] Bates, Partn. 1136; Walker v. Matthews, 58 Ill. 196; Robinson v. Green's Adm'r, 5 Har. (Del.) 115. A partnership, as to third persons, may be shown by facts which would not prove a partnership inter se. Bissell v. Warde, 129 Mo. 439, 31 S. W. 928.

[4] Beecher v. Bush, 45 Mich. 188, 7 N. W. 785. See, also, Bullen v. Sharp (Exch. Chamb.) L. R. 1 C. P. 86; Mollwo v. Court of Wards, L. R. 4 P. C. 419. In the former case, Bramwell, B., said, as to the distinction sometimes made between partnership inter se and as to third persons: "The burden of proof

Partnerships Distinguished from Corporations.

A corporation is a fictitious person, created by special authority (in this country by the legislature; in England by the crown or by parliament), and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals; but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of those individuals; nor are the rights and obligations of the body corporate exercisable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. The share of a member of a corporation may be transferred by death or otherwise without affecting the identity of the corporation, which remains the same, though all of its members may have changed. The liability of stockholders is usually limited to the amount of their unpaid subscriptions. Profits, when earned, belong to the fictitious entity, not to the individuals composing it. With partnerships the case is otherwise. The members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. They are created by act of the parties, and not by public franchise. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. The transfer

* * * is on the plaintiffs. Now, what reason do they give? They say that the defendant is a partner with his son; and that, if not partners inter se, they are so as regards third parties. A most remarkable expression! Partnership means a relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves? They have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him. But that must mean inter se; for partnership is a relation inter se, and the word cannot be used except to signify that relation. A. is not the agent of B. B. has never held him out as such; yet C. is entitled, as between himself and B., to say that A. is the agent of B. Why is he so entitled, if the fact is not so, and B. has not so represented?"

"We also think there can be no such thing as a partnership as to third persons when, as between the parties themselves, there is no partnership, and the third persons have not been misled by concealment of facts or by deceptive appearances." Beecher v. Bush, supra.

of one partner's interest by death or otherwise works a dissolution of the partnership. Partners are usually personally liable for all the debt of the partnership. Profits, when earned, belong to all the partners as joint owners.

Co-ownership and Partnership Distinguished.

No partnership necessarily subsists among persons to whom property descends, or is given jointly or in common;[5] and even if several persons agree to buy property, to hold jointly or in common, although by the purchase they become co-owners,[6] they do not become partners unless that also was their intention.[7] Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows: (1) Co-ownership is not necessarily the result of agreement; partnership is.[8] (2) Co-ownership does not necessarily involve community of profit or of loss; partnership does.[9] (3) One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferror himself was before the transfer; a partner cannot do this.[10] (4) One co-owner is not as such the agent real or implied of the others; a partner is.[11] (5) One co-owner has no

[5] Dunham v. Loverock, 158 Pa. St. 197, 27 Atl. 990. Where premises and the business conducted thereon and the appliances are devised to two persons, and they continue the business, each contributing thereto his share of the property, they become partners, and the premises are partnership property. MacFarlane v. MacFarlane, 82 Hun, 238, 31 N. Y. Supp. 272.

[6] Hoare v. Dawes, 1 Doug. 371. As to whether joint purchasers become tenants in common, or joint tenants, see Lake v. Gibson, 1 Eq. Cas. Abr. 290; Aveling v. Knipe, 19 Ves. 441; Crossfield v. Such, 8 Exch. 825; Harris v. Fergusson, 16 Sim. 308; Robinson v. Preston, 4 Kay & J. 505; Bone v. Pollard, 24 Beav. 283; Harrison v. Barton, 1 Johns. & H. 287, in which the admissibility of parol evidence on the point was much discussed. In French v. Styring, 2 C. B. (N. S.) 357, the race horse was clearly held in common, the owners having become such at different times and by different titles.

[7] Stevens v. McKibbin, 15 C. C. A. 498, 68 Fed. 406. See Kay v. Johnston, 21 Beav. 536. Whether they intended to become partners or not may, of course, be doubtful, as in Sharpe v. Cummings, 2 Dowl. & L. 504, where two persons hired a field wherein to graze their cattle. See post, p. 30, "Intention to be Partners."

[8] See definition, ante, p. 2. Also, see post, p. 50; Story, Partn. §§ 3, 89–94.

[9] See post, p. 34 et seq. [10] See post, p. 153. [11] See post, p. 37 et seq.

lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt; a partner has.[12]

Same—Co-owners Sharing Profits.

When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference, if any, between them and partners, becomes very obscure. The point to be determined is whether, from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.[13] If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand, if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits, if not also in the property which yields them.[14] Many perplexing cases may be imagined interme-

[12] If two persons buy a horse, each paying one-half of the purchase money, under an agreement that either of them, having possession of the horse, shall provide for his keeping, without cost to the other, and that each shall offer the horse for sale and endeavor to procure a purchaser at a profit over his cost, but that neither shall sell the horse without the concurrence of the other, they are tenants in common of the horse, and not partners; and neither party has any lien upon the share of the other for expenses incurred either for labor done upon the horse, as by shoeing, or for advertising him for sale. Goell v. Morse, 126 Mass. 480. See, also, post, p. 179, "Partner's Lien." And see Oliver v. Gray, 4 Ark. 425; Goodrich v. Willard, 7 Gray (Mass.) 183; Chapman v. Eames, 67 Me. 452; Quackenbush v. Sawyer, 54 Cal. 439.

[13] See Sargent v. Downey, 45 Wis. 498; Thurston v. Horton, 16 Gray (Mass.) 274; Chisholm v. Cowles, 42 Ala. 179. Part owners of a vessel are tenants in common, not partners. Coursin's Appeal, 79 Pa. St. 220; Paynter v. Paynter, 7 Phila. 336; Macy v. De Wolf, 3 Woodb. & M. 193, Fed. Cas. No. 8,933. See, also, post, note 21.

[14] Lindl. Partn. 53. Each of two firms bought an undivided interest in certain leases of land on which an oil well had been built, and prepared the well for pumping, each paying one-half the expense. When the first well was put in order, they built another well, and divided the expense incurred. The oil was run into pipe lines through the district, and one-half of it was credited to each firm. Held not to show a partnership. Butler Sav. Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163. See, also, instances of the sharing of gross profits, post, p.

diate between those here put as examples, but the following illustrations will, it is hoped, enable the reader to appreciate the distinction in question.

Joint Purchasers of Goods for Resale.

If several persons jointly purchase goods for resale, with a view to divide the profits arising from the transaction, a partnership is thereby created.[15] But persons who join in the purchase of goods, not for the purpose of selling them again, and dividing the profits, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties as if they were. Coope v. Eyre [16] is a leading case in support of this proposition. There an agreement was come to that one person should purchase oil, and then divide it among himself and others, they paying him their proportion of the price. The oil was bought accordingly, and, the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser purchased as a principal, and not as an agent, and that, as there was no community of profit or loss, the persons among whom the oil was to be divided could not be made liable as partners. In Hoare v. Dawes [17] there was a similar agreement, and Lord Mansfield thought at first that there was a partnership as to third persons; but he ultimately decided that there was not, there being no agreement to share profit or loss, and there being no pretense for holding the purchasers liable for the acts of each other

65. As to co-ownership in mines and mining partnerships, see Lindl. Partn. p. 55 et seq.; Kahn v. Smelting Co., 102 U. S. 641; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713; Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851. For extended note on remedies available to one co-owner against the others, see Lindl. Partn. p. 57.

15 Reid v. Hollinshead, 4 Barn. & C. 867. An agreement between two persons that they will undertake jointly the enterprise of buying a piece of land and selling it again at an advance, each to have one-half the profits, does not constitute a partnership. Gottschalk v. Smith, 54 Ill. App. 341, affirmed 156 Ill. 377, 40 N. E. 937.

16 1 H. Bl. 37. See, also, Hurley v. Walton, 63 Ill. 260; Stoallings v. Baker, 15 Mo. 481; Gilman v. Cunningham, 42 Me. 98. Cf. Everitt v. Chapman, 6 Conn. 347; Loomis v. Marshall, 12 Conn. 85–87; Ensign v. Wands, 1 Johns. Cas. 171; Farmers' Ins. Co. v. Ross, 29 Ohio St. 429.

17 1 Doug. 371.

by reason of their holding themselves out as partners. So, in Gibson v. Lupton,[18] two persons joined in the purchase of some wheat, with the intention of dividing and paying for it equally; and it was held that, as there was no joint interest in profit or loss, they could not be considered partners, either as between themselves or as regarded third parties.

Part Owners Sharing the Produce of Their Property.

Moreover, part owners who divide what is obtained by the use or employment of the thing owned are not thereby constituted partners. For example, if two tenants in common of a house let it, and divide the rent equally among them, they are not partners, although they may pay for repairs out of the rent before dividing it.[19] So, two persons who are tenants in common of a race horse, and share his winnings on the one hand, and the expenses of his keep on the other, are not partners, but co-owners only.[20] So, part owners of ships are not usually partners,[21] although they may be partners as well as part owners, as was the case in Campbell v. Mullett.[22]

Partnership Distinguished from Agency.

The law of partnership is closely connected with the law of agency. "Everybody knows that a partnership is a sort of agency, but a very peculiar one." [23] A partner virtually embraces both the character of a principal and an agent. It would be impossible at this place to explain in any brief form of words the rule for determining when

[18] 9 Bing. 297.

[19] Per Willis, J., in French v. Styring, 2 C. B. (N. S.) 357, 366. Cf. Butler Sav. Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163. See, also, London Financial Ass'n v. Kelk, 26 Ch. Div. 107, and Lyon v. Knowles, 3 Best. & S. 556.

[20] French v. Styring, 2 C. B. (N. S.) 357. Evidence that two farmers, purchasing a threshing machine, paid for the same with their joint and several notes, secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing machine was partnership property, nor that a co-partnership relation existed between the farmers. State Bank of Lushton v. O. S. Kelley Co. (Neb.) 66 N. W. 619.

[21] Helme v. Smith, 7 Bing, 709; Ex parte Young, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose, 76; Green v. Briggs, 6 Hare, 395; and cases cited ante, note 13.

[22] 2 Swanst. 551. [23] Pooley v. Driver, 5 Ch. Div. 458.

one is a partner and when one is an agent. This will appear fully in the discussion of what constitutes a partnership. It will be sufficient at this point to anticipate the results of that discussion. If an agreement for the conduct of a business and a sharing of the profits results in a joint ownership of the profits, the parties are partners.[24] But if the agreement does not make the parties joint owners of the profits, but one of them takes a share in them, not because he is an owner of a proportionate part of them, but because, under the contract, the other party owes him that sum as a debt for services rendered, he is an agent. The real intention of the parties, and not the mere form of words, controls.[25]

ESTABLISHMENT OF RELATION.

2. A partnership is created only by contract, never by operation of law.

3. The contract of partnership must satisfy in all respects the requisites of a valid contract. These requisites will be considered under the following heads:

(a) Competency of parties (p. 10).
(b) Consideration (p. 17).
(c) Formalities (p. 20).
(d) Subject-matter (p. 23).
(e) Intention to be partners (p. 30).

Partnership Created Only by Contract.

It results from the definition of a partnership, as the relation existing between persons who have so agreed that the profits of a business to be carried on by one or more of them for all of them enure to them all as co-owners, that a partnership can be created only by contract. A partnership is never created by operation of law.[26]

[24] See post, p. 50.

[25] See post, p. 30.

[26] Bates, Partn. § 3; T. Pars. Partn. § 6; Story, Partn. § 3. The joint prosecution of lawsuit does not create a partnership between the parties as to the subject-matter in dispute. As to the parties themselves, the partnership cannot be formed by implication or operation of law. Wilson's Ex'rs v. Cobb's Ex'rs, 28 N. J. Eq. 177. A partnership is not established between a husband and wife by the mere fact that they purchase property jointly. Ingals v. Ferguson, 59 Mo. App. 299.

When it exists it is always as the result of an express or implied agreement to be partners, or to do acts, which agreement the law declares constitutes a partnership. Thus, where a father and his sons conducted a business without any agreement between them, the sons drawing no salary, and having merely an expectation of ultimate succession, no partnership exists.[27] So, where persons living together as husband and wife accumulate property, on the death of the man the woman is not entitled to the property as surviving partner, as against a former wife.[28]

COMPETENCY OF PARTIES.

4. Parties competent to enter into ordinary contracts are competent to form a partnership. This will be considered with reference to

(a) Aliens (p. 11).
(b) Felons (p. 11).
(c) Infants (p. 11).
(d) Lunatics (p. 14).
(e) Married women (p. 14).
(f) Corporations (p. 15).
(g) Number of persons who may become members of one partnership (p. 16).

Considering the agreement first with reference to its parties, it is to be remarked that these parties, just like the parties to any other

When funds invested in a partnership business by the wife are community property, the husband becomes a partner in the business. Houghton v. Puryear (Tex. Civ. App.) 30 S. W. 583.

[27] Phillips v. Phillips, 49 Ill. 437. Partnership can only exist as between the parties themselves, in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone cannot create a partnership without the assent of the other. Id. Cf. Ratzer v. Ratzer, 28 N. J. Eq. 136, where the facts were very similar to the above case, but where a partnership was decreed to have existed between the parties. See, also, Farr v. Wheeler, 20 N. H. 569; Wilson's Ex'rs v. Cobb's Ex'rs, 28 N. J. Eq. 177; Estate of Winters, 1 Myr. Prob. (Cal.) 131; In re Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383.

[28] Winters' Estate, 1 Myr. Prob. (Cal.) 131.

contract, must have been able to contract if they are to be held to be the partners of each other. Who can be a member of a partnership depends on what power the individual has at law to consent so as to bind himself. The law imposes restrictions upon individuals in respect of their entering into contracts, or allows them to plead disabilities when they are sought to be held bound by contracts, only in the cases of certain classes of persons. The want of ability or capacity of persons to contract, so as to become members of partnerships, is to be considered according as such persons may be within the accepted classifications of (1) aliens, (2) felons, (3) infants, (4) lunatics, (5) married women, and (6) corporations. All persons other than those thus enumerated may participate in the relation.

Aliens.

It is said that no disability attaches to aliens as parties contracting for the partnership relation, so long as they are not alien enemies. An alien not bearing the character of an alien enemy is, in other words, eligible as a partner.[29] But hostilities between the United States and another country render a voluntary resident of that other country ineligible as a member of a partnership here.[30] Indeed, an existing partnership in the United States composed of individuals, any one of whom is voluntarily resident of another country, is ipso facto dissolved by the inauguration of hostilities between that country and this.[31]

Felons.

Felons probably do not, in the absence of statutory restrictions, labor under any disability to contract in this country; and hence, unless so restricted, they may be members of a partnership.

Infants.

An infant may become a partner,[32] but, notwithstanding his becoming so, he incurs no liability during his minority, and is responsible

29 Bates, Partn. §§ 110, 131; Story, Partn. § 9.

30 McConnell v. Hector, 3 Bos. & P. 113; Evans v. Richardson, 3 Mer. 469; Brandon v. Nesbitt, 6 Term R. 23; McAdams v. Hawes, 9 Bush. (Ky.) 15. See Griswold v. Waddington, 15 Johns. (N. Y.) 57.

31 See post, p. 402; Griswold v. Waddington, 15 Johns. (N. Y.) 57.

32 Goode v. Harrison, 5 Barn. & Ald. 147; Dunton v. Brown, 31 Mich. 182; Osburn v. Farr, 42 Mich. 134, 3 N. W. 299; Whitney v. Dutch, 14 Mass. 457;

for no debts, but may, before coming of age or within a reasonable time thereafter, disaffirm all the partnership transactions,[33] even to the prejudice of a stranger trading with the firm having no notice of his minority. This disaffirmance, however, must be made within a reasonable time after his reaching full age, or before his reaching it at all.[34] What is such reasonable time depends on the facts involved in each particular case. The right to repudiate the partnership, however, is the privilege of the infant.[35] The adult partners are bound. An infant is not liable for the torts of his agent, and it follows that he is not liable for the misconduct of his fellow partner.[36]

Penn v. Whitehead, 17 Grat. (Va.) 503; Bush v. Linthicum, 59 Md. 344; Adams v. Beall, 67 Md. 53, 8 Atl. 664. A minor may become a general partner under the limited partnership act. Continental Nat. Bank of Boston v. Strauss, 137 N. Y. 148, 32 N. E. 1066.

[33] Vinsen v. Lockard, 7 Bush (Ky.) 458; Neal v. Berry, 86 Me. 193, 29 Atl. 987; Ex parte Taylor, 8 De Gex, M. & G. 254; Bush v. Linthicum, 59 Md. 344; Bixler v. Kresge, 169 Pa. St. 405, 32 Atl. 414; Mehlhop v. Rae, 90 Iowa, 30, 57 N. W. 650; Lindl. Partn. 74. An infant partner ought not to be joined as a defendant in an action against the firm. Chandler v. Parkes, 3 Esp. 76; Jaffray v. Frebain, 5 Esp. 47; Gibbs v. Merrill, 3 Taunt. 307; Burgess v. Merrill, 4 Taunt. 468.

[34] Jenkins v. Jenkins, 12 Iowa, 195; Green v. Wilding, 59 Iowa, 679, 13 N. W. 761; Hartman v. Kendall, 4 Ind. 403; Kline v. Beebe, 6 Conn. 494; Goodnow v. Lumber Co., 31 Minn. 468, 18 N. W. 283. An infant partner may, before coming of age (Murphy v. Johnson, 45 Iowa, 57; Childs v. Dobbins, 55 Iowa, 205, 7 N. W. 496; Adams v. Beall, 67 Md. 53, 8 Atl. 664; Folds v. Allardt, 35 Minn. 488, 29 N. W. 201; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; contra, Dunton v. Brown, 31 Mich. 182), or within a reasonable time thereafter (Dunton v. Brown, supra) disaffirm all the partnership transactions, even to the prejudice of a stranger trading with the firm, having no notice of his minority; Lindl. Partn. 74; Vinsen v. Lockard, 7 Bush (Ky.) 458. A person who, before he comes of age, represents himself as a partner, must, when he comes of age, take care to notify that he has ceased to be a partner if he wishes to avoid liability. Lindl. Partn. 76; Goode v. Harrison, 5 Barn. & Ald. 147.

[35] Stein v. Robertson, 30 Ala. 286. See Brown v. Insurance Co., 117 Mass. 479; Hastings v. Dollarhide, 24 Cal. 195. An infant, in order to escape liability upon his contract of partnership, must set up his infancy; otherwise, the co-partner may demand that the property of the firm be devoted to the payment of partnership debts, and that each partner shall contribute pro rata to the payment of the excess of the debt after so devoting such property. Whittemore v. Elliott, 7 Hun (N. Y.) 518.

[36] Lindl. Partn. 75.

An infant cannot invoke his minority as a shield in a case where he has deliberately attempted to defraud by misstating his age.[37] Another check upon a designing infant partner is that, by refusing to participate in the losses of his firm, he waives the right to share in its profits.[38] He can, by a timely disaffirmance, as above stated, avoid a contract he has made. Besides this, he can, if it has not benefited him in any way, recover back whatsoever money he may have paid under it, but not if he has been benefited, unless he can put the party contracting with him in a position as if no contract had ever been made.[39]

[37] At common law, his infancy is a defense to an action on the contract, but not to an action on the case for deceit. Vinsen v. Lockard, 7 Bush (Ky.) 458; Clark, Cont. 261. "In equity, where the infant has falsely represented that he was of age, or taken active steps to conceal his age, or been otherwise guilty of fraud, and has thereby induced the other party to enter into the contract, his fraud will estop him from pleading his infancy to the other's prejudice." Id. Where the contract was induced by fraud of the infant, the adult partner may rescind or dissolve it. Bush v. Linthicum, 59 Md. 344; Lempriere v. Lange, 12 Ch. Div. 675. In Burgess v. Merrill, 4 Taunt. 468, 469, Chief Justice Mansfield says: "If an infant forms a partnership with an adult, he holds himself forth to the world as not being an infant; he practices a fraud on the world." Approved in Kemp v. Cook, 18 Md. 130. But this is not law. Lindl. Partn. 74; Bates, Partn. 142. See Glossop v. Colman, 1 Starkie, 25; Green v. Greenbank, 2 Marsh. C. P. 485.

[38] An infant cannot, as against his co-partners, insist that, in taking the partnership accounts, he shall be credited with profits, and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits. Lindl. Partn. 75; Miller v. Sims, 2 Hill (S. C.) 479; Dana v. Stearns, 3 Cush. (Mass.) 372. An infant may avoid personal liability by disaffirming a contract made by a firm of which he was a member, without disaffirming the contract of partnership. Mehlhop v. Rae, 90 Iowa, 30, 57 N. W. 650. Contra, Miller v. Sims, 2 Hill (S. C.) 479. Though an infant may rescind on account of his infancy, the firm creditors have a prior right in the firm property. Yates v. Lyon, 61 N. Y. 344; Pelletier v. Couture, 148 Mass. 269, 19 N. E. 400; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Lovell v. Beauchamp [1894] App. Cas. 607; Moley v. Brine, 120 Mass. 324.

[39] Lindl. Partn. 75. But see Clark, Cont. 254. In Page v. Morse, 128 Mass. 99, it was held that if an infant becomes a partner with another, and puts a sum of money into the business, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or for labor performed, in the absence of an express promise to pay him therefor. See, also, Moley v. Brine, 120 Mass. 324. Cf. Sparman v. Keim, 83 N. Y. 245. And see Adams v. Beall, 67 Md. 53, 8 Atl. 604.

Lunatics.

As to lunatics, the law of contracts protects persons contracting with them in ignorance of their mental condition, when the contract has been actually executed. It may be said that a lunatic may be a partner legally in some conceivable cases. At the same time, it is well to be mindful of the fact that all transactions with him with knowledge of his condition may be subsequently impeached.[40] The fact of lunacy of a partner developed during the currency of the partnership does not dissolve the latter ipso facto; but, on the contrary, he is entitled to a share of the profits made by the other partners subsequently. Moreover, he is liable for the subsequent misconduct of his fellow partners.[41]

Married Women.

At common law a feme covert could make no valid contracts, whether with her husband or any person else. Therefore she could not become a party to any valid agreement to form a partnership relation.[42] The removal of the disability of a married woman to be such a party has been effected, where the disability has been removed at all, through express legal enactment, so that what her situation is in this regard depends on the statutes prevailing in the place where the contract is attempted to be entered into. The effect of these laws is in some of the states to allow her to become a party to a partnership agreement generally, while in others she is limited to such agreements as concern a partnership relation in which her husband does not participate.[43]

Same—May Husband and Wife Become Co-partners in Business?

The weight of authority goes to show that husband and wife may not be members of the one partnership, the decisions, as a rule, being

[40] Lindl. Part. 76; Fay v. Burditt, 81 Ind. 433; Behrens v. McKenzie, 23 Iowa, 333; Clark, Cont. p. 263.

[41] Story, Partn. §§ 295–297; Raymond v. Vaughan, 17 Ill. App. 144; Reynolds v. Austin, 4 Del. Ch. 24. See, also, Davis v. Lane, 10 N. H. 161; Isler v. Baker, 6 Humph. (Tenn.) 85; Griswold v. Waddington, 15 Johns. (N. Y.) 57.

[42] Except in case of abandonment, separation, alienage of husband, conviction of husband of felony, etc., or where she had a separate estate. See Lindl. Partn. p. 77.

[43] Silveus' Ex'rs v. Porter, 74 Pa. St. 448; Dupuy v. Sheak, 57 Iowa, 361, 10 N. W. 731; Newman v. Morris, 52 Miss. 402; Vail v. Winterstein, 94 Mich. 230, 53 N. W. 932. But see Vannerson v. Cheatham, 41 S. C. 327, 19 S. E. 614.

against it, even in the states where the laws are most liberal in respect of the right of a feme covert to bind herself by contract.[44] The incapacity is not one that concerns the wife only, and hence it remains notwithstanding such laws, unless, indeed, they expressly declare that the husband and wife may contract with each other generally. The disability is one entirely outside of the common-law doctrine of a feme covert not being sui juris, and therefore is not removed by statutes intended merely to change the common law in that respect. The point upon which the disability rests in the legal status of husband and wife, who, in contemplation of law, are one person, no individual being able to contract with himself.

Corporations.

Corporations, being restricted by the provisions of their charters or constitutions to the employment of their funds for only specified purposes, are prima facie ineligible as members of a partnership.[45]

[44] Knowles v. Hull, 99 Mass. 562; Bowker v. Bradford, 140 Mass. 521, 5 N. E. 480; Plumer v. Lord, 5 Allen (Mass.) 460; Lord v. Parker, 3 Allen (Mass.) 127; Haas v. Shaw, 91 Ind. 384; Scarlett v. Snodgrass, 92 Ind. 262; Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654; Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907; Bernard & Leas Manuf'g Co. v. Packard & Calvin, 12 C. C. A. 123, 64 Fed. 309; Miller v. Marx, 65 Tex. 131; Cox v. Miller, 54 Tex. 16; Brown v. Chancellor, 61 Tex. 445; Smith v. Bailey, 66 Tex. 553, 1 S. W. 627; Carey v. Burruss, 20 W. Va. 571; Mayer v. Soyster, 30 Md. 402; Hamilton v. Hamilton, 89 Ill. 351; Hoker v. Boggs, 63 Ill. 161. But see Dressel v. Lonsdale, 46 Ill. App. 454. In Re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824, Blodgett, J., in the United States district court, holds otherwise. Knott v. Knott, 6 Or. 150; Frank v. Anderson, 13 Lea (Tenn.) 695. See Theus v. Dugger, 93 Tenn. 41, 23 S. W. 135; Gilkerson-Sloss Commission Co. v. Salinger, 56 Ark. 294, 19 S. W. 747. In Wisconsin the question is doubtful. See Horneffer v. Duress, 13 Wis. 603; Duress v. Horneffer, 15 Wis. 195. But see Fuller & Fuller Co. v. McHenry, 83 Wis. 573, 53 N. W. 896. In New York the question is in confusion. In Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, it is held that she can, but the case seems to stand alone in that state. Three judges dissented. Board of Trade of City of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, and 32 Pac. 224. Contra, Louisville & N. R. Co. v. Alexander (Ky.) 27 S. W. 981; Lane v. Bishop, 65 Vt. 575, 27 Atl. 499.

[45] People v. North River Sugar-Refining Co., 121 N. Y. 582, 24 N. E. 834; New York & S. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Whittenton Mills v. Upton, 10 Gray (Mass.) 582; Hackett v. Railroad Co., 12 Or. 124, 6 Pac. 659; Burke v. Railroad Corp., 8 Am. & Eng. R. Cas. 552;

Number of Persons Who may Become Members of One Partnership.

Any limitation upon the number of individuals who may contract to form a co-partnership must, of necessity, be effected by statute. In England no more than 10 persons may engage as partners in banking, and not more than 20 in any other kind of business for profit.[46]

Partnerships between Firms.

There would seem to be no legal difficulty in the way of treating two firms as individual partners in a conjoint firm, if such be the obvious intention of the parties. So, also, there may be a partnership between a firm and an individual.[47]

Mallory v. Oil-Works, 86 Tenn. 598, 8 S. W. 396. See, also, Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331; Bissell v. Railroad Co., 22 N. Y. 258 (cf. Gunn v. Railroad Co., 74 Ga. 509); French v. Donohue, 29 Minn. 111, 12 N. W. 354; Marine Bank v. Ogden, 29 Ill. 248. It is not within the power of a business corporation to enter into a partnership, and a purchase of an interest in a partnership by such corporation does not constitute it a partner. Aurora State Bank v. Oliver, 62 Mo. App. 390. In Butler v. Toy Co., 46 Conn. 136, it was held that the charter of defendant authorized it to enter into a partnership with a firm.

"A corporation may, in furtherance of the object of its creation, contract with an individual, though the effect of the contract may be to impose upon the company the liability of a partner. And as to third persons, the liability of a partner is frequently imposed, though it was not the intention of the party sought to be charged to become one; and even though a partnership could not have been made." Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556.

[46] 25 & 26 Vict. c. 89, § 4. As to this point in America, see laws of the several states.

[47] In re Hamilton, 1 Fed. 800; Raymond v. Putnam, 44 N. H. 160; Bullock v. Hubbard, 23 Cal. 496; Meador v. Hughes, 14 Bush (Ky.) 652. A partnership between individuals and a second partnership constitutes all members of the second partnership members of the first. Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495.

CONSIDERATION.

5. A partnership agreement, like other contracts, must have a consideration to support it.

Agreements to share profits, like all other agreements, require to be founded on some consideration in order to be binding.[48] Any contribution in the shape of capital or labor, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement.[49] A bona fide contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter. As observed by Vice Chancellor Wigram:[50] "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the court to measure the quantum of value. The parties must decide that for themselves."

Profits to be Shared, but Losses not.

"It often happens that persons agree that all profits shall be shared ratably, and, nevertheless, that all losses shall be borne by some one of them exclusively. Such an agreement is not necessarily invalid as a

[48] A partnership agreement without mutuality is void. Thus, an agreement of partnership between two persons, by which one, without furnishing any means or doing anything to further the common enterprise, is to share equally in the profits and property acquired, is without mutuality, founded on no consideration, and void. Mitchell v. O'Neale, 4 Nev. 504. See, also, Frothingham v. Seymour, 118 Mass. 489; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Dale v. Hamilton, 5 Hare, 393; Kimmins v. Wilson, 8 W. Va. 584.

[49] Lindl. Partn. p. 63. Allowing the use of one's name is a sufficient consideration. McCord v. Field, 27 U. C. C. P. 391. See Coleman v. Eyre, 45 N. Y. 38; Breslin v. Brown, 24 Ohio St. 565; Belcher v. Conner, 1 S. C. 88. A promise to account for one-half of the profits of a trading venture is supported by a promise to share one-half of the losses. It is a clear case of mutual promises, and the obligation of each party is a good consideration for that of the other. Such an agreement is not within the clause of the statute of frauds requiring agreements for the sale of goods to be in writing. Coleman v. Eyre, 45 N. Y. 38.

[50] Dale v. Hamilton, 5 Hare, 393.

nudum pactum; for it is nothing more than an agreement, providing among other things, that some or one of the partners shall indemnify the others against losses; and the very fact that these latter become, or agree to become, partners, is quite sufficient consideration to give validity to a contract that they shall be indemnified. Such agreements appear, moreover, to be reasonable, where the partners indemnified leave the whole management of the concern to their co-partners." [51]

Premiums.

It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium; i. e. a sum of money for his own private benefit. Such an agreement is valid; and, if the premium is not duly paid, it may be recovered by an action, provided the plaintiff has been ready and willing to take the defendant into partnership, as agreed.[52] The consideration for the premium is not only the creation of a partnership between the person who takes and him who parts with the money, but also the continuance of that partnership; and if a person, on his entry into a partnership, pays a premium, and then the partnership is determined sooner than was expected, the question arises whether any, and, if any, what part, of the premium ought to be returned.[53] In order to determine this point, it is necessary, in the first place, to ascertain whether the agreement for the premium was or was not tainted with fraud.

Premiums Returnable in Cases of Fraud.

If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses, viz. either abide by the contract, and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts, or he may disaffirm the contract, and thereby entitle himself to a return of the whole of the money he has paid.

[51] Lindl. Partn. p. 63; Geddes v. Wallace, 2 Bligh, 270. But see, contra, Brophy v. Holmes, 2 Moll. 1.

[52] Lindl. Partn. p. 64; Walker v. Harris, 1 Anstr. 245. See, also, post, p. 298, "Actions between Partners."

[53] See Pol. Partn. art. 59; Edmonds v. Robinson, 29 Ch. Div. 170. See, also, Smith v. Everett, 126 Mass. 304; Tournade v. Hagedorn, 5 Thomp. & C. (N. Y.) 288; Capen v. Barrows, 1 Gray (Mass.) 376.

And in a case of this sort, in the event of the bankruptcy of the defrauding partner, the amount of the premium paid to him is a debt provable against his estate, in competition with his separate creditors.[54]

Return of Premium Where the Consideration for It has Failed.

But if the agreement by virtue of which the partnership was entered into, and the premium became payable, is not tainted by fraud, then the proper mode of dealing with the premium is not so easy to determine. In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a total failure of consideration for the premium, and, consequently, it cannot be recovered as money paid for a consideration which has failed.[55] In the next place, persons who enter into partnership know that it may be determined at any time by death and other events; and, unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle.[56]

Apportionment of Premium When Partnership Ceases Sooner Than was Expected.

On the other hand, if a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium.[57] Moreover, where there has been no misconduct, a pre-

[54] Lindl. Partn. p. 64.

[55] See Taylor v. Hare, 1 Bos. & P. (N. R.) 260.

[56] Whincup v. Hughes, L. R. 6 C. P. 78; Ferns v. Carr, 28 Ch. Div. 409; Farr v. Pearce, 3 Madd. 74. But not so where the probability of death within a short time was known, and not disclosed, Mackenna v. Parkes, 36 Law J. Ch. 366, 15 Wkly. Rep. 217, or where there is any other fraud, Hamil v. Stokes, 4 Price, 161. Termination by bankruptcy: Cf. Akhurst v. Jackson, 1 Swanst. Ch. 85, with Freeland v. Stansfeld, 2 Smale & G. 479.

[57] Lindl. Partn. p. 65. See, also, Richards v. Todd, 127 Mass. 167; Boughner v. Black's Adm'r, 83 Ky. 521; Hamil v. Stokes, 4 Price, 161; Freeland v. Stansfeld, 2 Smale & G. 479; Jauncey v. Knowles, 29 Law J. Ch. 95; Mycock v. Beatson, 13 Ch. Div. 384. Where the dissolution is from the fault of the one who paid the premium, it cannot be recovered. Bluck v. Capstick, 12 Ch. Div. 863; Wilson v. Johnstone, L. R. 16 Eq. 606; Airey v. Borham, 29 Beav. 620.

mium paid for a partnership for a term of years has been held apportionable in the event of a premature determination of the partnership by an unforeseen occurrence. The fact that the consideration for the premium has partially failed has been considered sufficient to render it inequitable to retain or obtain payment of the whole premium.[58] The principles applicable to cases of this description are not even yet well settled, nor are the decisions upon them easy to reconcile.

FORMALITIES.

6. No particular formalities are essential to the validity of a contract of partnership.

In the absence of statute, no peculiar formalities are necessary to the validity of a contract of partnership. The agreement may be either express or implied; in writing or parol. In some states there are statutes requiring written agreements for all partnerships, and in all the states writing, and not only that, but publication also, and sometimes still other formalities, are required in order to give validity to what are known as limited partnerships.[59] These requirements must be strictly observed, or the parties will be liable as general partners.

But the fact that the claimant was the active party in procuring the dissolution is immaterial where he has good cause for his action. See Bullock v. Crockett, 3 Giff. 507; Atwood v. Maude, 3 Ch. App. 369.

[58] Where a premium is paid for admission to a partnership dissoluble at will, there is an implied condition that it shall continue a reasonable time; and, if the party receiving the premium dissolves immediately, he must return the premium. Featherstonhaugh v. Turner, 25 Beav. 382; Rooke v. Nisbet, 50 Law J. Ch. 588. A year has been held a reasonable time. Carlton v. Cummins, 51 Ind. 478. See, also, Tattersall v. Groote, 2 Bos. & P. 134, per Lord Eldon. A mere consent or agreement to dissolve, which is silent as to the premium, leaves all questions of this sort open, and does not vary the rights under the original agreement. Lindl. Partn. p. 66. Where partnership has continued for a time, the court has a wide discretion as to the amount to be returned. Lyon v. Tweddell, 17 Ch. Div. 529. But it is usual to apportion the premium with reference to the agreed and actual duration of the partnership. See Pease v. Hewitt, 31 Beav. 22; Astle v. Wright, 23 Beav. 77; Bury v. Allen, 1 Colly. 589, and cases cited supra. But see Hamil v. Stokes, Dan. 20, where this rule was not followed. See, generally, Pol. Partn. art. 59.

[59] See post, p. 417.

Statute of Frauds.

Where, however, the contract is not to be performed within a year, it is required by the statute of frauds to be in writing, or it will be void.[60] This enactment applies as well to an agreement for a partnership to commence more than a year from the date of the agreement[61] as to an agreement for a present partnership to last more than a year from its commencement.[62] But if in either case the parties have acted on the agreement, and becomes partners, they must be treated as such, and the statute will not be applicable.[63]

Same—Partnerships in Land.

With respect to that part of the fourth section of the statute of frauds, which relates to lands, it is held (1) that a partnership constituted without writing is as valid as one constituted by writing;[64] and (2) that, if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land.[65] This was first clearly laid down in Forster v. Hale,[66] where a person attempted

[60] The fourth section of the statute of frauds is as follows: "That no action shall be brought whereby to charge * * * any person * * * upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

[61] Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Williams v. Jones, 5 Barn. & C. 108, per Holroyd, J.; Whipple v. Parker, 29 Mich. 369. But see Coleman v. Eyre, 45 N. Y. 38; Huntley v. Huntley, 114 U. S. 394, 5 Sup. Ct. 884.

[62] Cases cited note 61; Britain v. Rossiter, 11 Q. B. Div. 123; Morris v. Peckham, 51 Conn. 128; Jones v. McMichael, 12 Rich. (S. C.) 176; Williams v. Jones, 5 Barn. & C. 108. But see McKay v. Rutherford, 6 Moore, P. C. 414, 13 Jur. 21; Jordan v. Miller, 75 Va. 442; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336.

[63] Baxter v. West, 1 Drew. & S. 173; Williams v. Williams, 2 Ch. App. 294; Burdon v. Barkus, 4 De Gex, F. & J. 47; Allison v. Perry, 130 Ill. 9, 22 N. E. 492; Pio Pico v. Cuyas, 47 Cal. 174; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359; Gates v. Fraser, 6 Ill. App. 229. In such case they will be treated as partners at will. Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280.

[64] Essex v. Essex, 20 Beav. 449.

[65] Chester v. Dickerson, 54 N. Y. 1; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605; Flower v. Barnekoff, 20 Or. 132, 25 Pac. 370; Holmes v. McCray, 51 Ind. 358.

[66] 5 Ves. 309.

to obtain an account of the profits of a colliery, on the ground that it was partnership property; and it was objected that there was no signed writing, such as the statute required. But to this the lord chancellor observed: "That was not the question. It was whether there was a partnership. The subject being an agreement for land, the question, then, is whether there was a resulting trust for that partnership, by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If, by facts and circumstances, it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership." The principle here stated was carried to its extreme limit in Dale v. Hamilton,[67] where it was held that an agreement to form a partnership for the purpose of buying and selling land might be proved by parol; that it might then be shown by parol; that certain land had been bought for the purposes of the partnership; and, consequently, that the plaintiff was entitled to a share of the profits obtained by its resale.[68] The great weight of authority is in accord with these decisions.[69]

[67] 5 Hare, 369; s. c., on appeal, 2 Phil. Ch. 266.

[68] See, also, Cowell v. Watts, 2 Hall & T. 224. Lindley says (Lindl. Partn. p. 82) that this is certainly going a long way towards repealing the statute of frauds.

[69] Fairchild v. Fairchild, 64 N. Y. 471; Chester v. Dickerson, 54 N. Y. 1; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Allison v. Perry, 130 Ill. 9, 22 N. E. 492; Carr v. Leavitt, 54 Mich. 540, 20 N. W. 576; York v. Clemens, 41 Iowa, 95; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Sherwood v. Railway Co., 21 Minn. 127; Holmes v. McCray, 51 Ind. 358; McElroy v. Swope, 47 Fed. 380; Bunnel v. Taintor's Adm'r, 4 Conn. 568; Baldwin v. Johnson, 1 N. J. Eq. 441; Personette v. Pryme, 34 N. J. Eq. 26; Brooke v. Washington, 8 Grat. (Va.) 248; Marsh v. Davis, 33 Kan. 326, 6 Pac. 612. Contra, Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019; Raub v. Smith, 61 Mich. 543, 28 N. W. 676; Young v. Wheeler, 34 Fed. 98; Everhart's Appeal, 106 Pa. St. 349; Ebbert's Appeal, 70 Pa. St. 79; Lefevre's Appeal, 69 Pa. St. 123; Henderson v. Hudson, 1 Munf. (Va.) 510. Cf. Bird v. Morrison, 12 Wis. 153; Clarke v. McAuliffe, 81 Wis. 104, 51 N. W. 83. "There can be no doubt that

SUBJECT-MATTER.

7. The subject-matter of a contract of partnership invariably involves the prosecution of a business for profit.

8. A partnership cannot be formed to carry on a business which is unlawful or opposed to public policy.

Gain the Object of Partnership.

"The subject-matter of every contract is something which is to be done, or which is to be omitted."[70] This being so, it is not enough to say that the subject-matter of this particular kind of a contract is the creation of a partnership, for the relation is merely the result of an agreement. It results from the parties having agreed to do certain things, these things involving the prosecution of a business jointly, and the sharing of the profits and losses of that business. Whatever the parties have in contemplation in making their agreement, as the purpose of the latter, is the subject-matter of the partnership agreement. This subject-matter, without reference to anything else that may be part of it, invariably involves the idea of a business for profit.[71] The contemplation of profits inheres in the very definition of a partnership.[72]

the prevailing view is the better one. The contract is executed when the partnership relation is entered into. All that is done after that is done by and for the partnership. If land is purchased, it is the land of the partnership, and not of the individual partners. In short, the only action that could be brought for breach of the contract would be an action for failure to launch the partnership. Any cause of action arising after the partnership was formed would arise out of the partnership relation." T. Pars. Partn. (4th Ed.) § 6, note d.

[70] 1 Pars. Cont. 489.

[71] Where two persons tenants in common of a house, desiring to let the house, agreed that one of them should at his own expense put it in a tenantable condition, and manage it, and that the net rents should be cleared between them, there was no partnership. French v. Styring, 2 C. B. (N. S.), at page 366, per Willes, J. Sir Frederick Pollock, commenting on this case, said: "But if they furnished the house at their joint expense, and then let portions of the house as lodgings, they might well be partners. Letting a house is not a business, but letting furnished rooms is." Pol. Partn. p. 2. A business is a mercantile enterprise, susceptible of profits, on one hand, and losses on the other.

[72] See ante, p. 1.

Societies not Having Gain for Their Object.

Societies and clubs, the object of which is not to share profits, are not partnerships; nor are their members, as such, liable for each other's acts.[73] It was held in Caldicott v. Griffiths [74] that the members of the "Midland Counties Guardian Society for the Protection of Trade" were not partners inter se; and in Flemyng v. Hector,[75] that the members of the "Westminster Reform Club" were not partners as against third persons.[76] It is a mere misuse of words to call such associations "partnerships";[77] and, if liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves,[78] or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association.[79]

[73] The object of a partnership must be to share profits arising from some predetermined business. Therefore a Young Men's Christian Association is not a partnership, not being formed for pecuniary gain. Reg. v. Robson, 16 Q. B. Div. 137. See Andrews v. Alexander, L. R. 8 Eq. 176; Austin v. Thomson, 45 N. H. 113; Edgerly v. Gardner, 9 Neb. 130, 1 N. W. 1004; Eichbaum v. Irons, 6 Watts & S. (Pa.) 67.

[74] 8 Exch. 898.

[75] 2 Mees. & W. 172.

[76] See, also, Todd v. Emly, 8 Mees. & W. 505; St. James' Club, 2 De Gex, M. & G. 383.

[77] Reg. v. Robson, 16 Q. B. Div. 137. In Lloyd v. Loaring, 6 Ves. 773, the Caledonian Lodge of Freemasons, and in Silver v. Barnes, 6 Bing. N. C. 180, and Beaumont v. Meredith, 3 Ves. & B. 180, friendly societies, were called partnerships. In Minnitt v. Lord Talbot, L. R. Ir. 1 Ch. Div. 143, persons who had advanced money to add to and improve a club were held to have a lien on the property for their money. Cf. Woodward v. Cowing, 41 Me. 9.

[78] As in Cross v. Williams, 7 Hurl. & N. 675, where the commandant of a rifle corps was held liable for all uniforms he had ordered.

[79] Cf. Flemyng v. Hector, 2 Mees. & W. 172, and Wood v. Finch, 2 Fost. & F. 447, where the agency was not established, with Luckombe v. Ashton, Id. 705, Cockerell v. Aucompte, 2 C. B. (N. S.) 440, Burls v. Smith, 7 Bing. 705, and Delauney v. Strickland, 2 Starkie, 416, where the agency was established. In Luckombe v. Ashton and Burls v. Smith, the defendant was a member of the managing committee. This was not the case in Cockerell v. Aucompte or Delauney v. Strickland. See, also, Thomas v. Edwards, 2 Mees. & W. 215; Ash v. Guie, 97 Pa. St. 493; Eichbaum v. Irons, 6 Watts & S. (Pa.) 68; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; Blakely v. Bennecke, 59 Mo. 193; Rich-

What Business Enterprises may be the Subject of a Partnership Agreement.

Any enterprise proper for an individual to engage in for the purpose of enjoying the profits of it may as properly be pursued by a partnership for a like purpose. Chancellor Kent says that a partnership "may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans, or farmers, as well as between merchants and bankers." [80] At one time the impression prevailed that a partnership could not validly be formed for the purpose of dealing in real estate, but, under the modern decisions, real estate forms no exception to the rule stated above.[81]

Same— What Partnerships are Illegal.

In order that a partnership may result from a contract, such contract must not be illegal. Illegality, however, will not be presumed, but must plainly appear to enter into the essence of the contract. An agreement is illegal when its performance involves either (1) the violation of positive law, or (2) when it is opposed to public policy.[82]

The following are illustrations of partnerships illegal because involving the violation of positive law: Partnerships formed for the purpose of deriving profit from a criminal offense—e. g. smuggling, gambling, robbery, theft, and the like—are illegal.[83] So, where a

mond v. Judy, 6 Mo. App. 465; Ferris v. Thaw, 5 Mo. App. 279; Lafond v. Deems, 81 N. Y. 507.

[80] 3 Kent, Comm. 28.

[81] Thompson v. Bowman, 6 Wall. 316. See, also, Chester v. Dickerson, 54 N. Y. 1, and cases there cited; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605; Flower v. Barnekoff, 20 Or. 137, 25 Pac. 370.

[82] T. Pars. Partn. § 8.

[83] A bill by a partner of a lottery firm against his co-partners for discovery, for a sale of the property, and a distribution of the proceeds, will not be entertained (Watson v. Murray, 23 N. J. Eq. 257), even though the partnership contracts were entered into in another state, where such contracts are legal (Id.). See Sykes v. Beadon, 11 Ch. Div. 170. The same was held as to a partnership for gambling. Watson v. Fletcher, 7 Grat. (Va.) 1. See Boggess v. Lilly, 18 Tex. 200. For a case of a smuggling partnership, see Biggs v. Lawrence, 3 Term R. 454; Stewart v. Gibson, 7 Clark & F. 707; T. Pars. Partn. § 8. See, also, Gaston v. Drake, 14 Nev. 175 (agreement to divide fees of office of district attorney); King v. Winants, 71 N. C. 469; and Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124 (to stifle competitive bidding on public contract); Davis v. Gel-

statute prohibits unqualified persons from carrying on certain trades or business, a partnership between unqualified persons for the purpose of carrying on such a business would be illegal.[84] But the

haus, 44 Ohio St. 69, 4 N. E. 593 (conversion of public funds); Tenney v. Foote, 95 Ill. 99 (dealing in futures); Wann v. Kelly, 5 Fed. 584 (Id.); Patterson's Appeal (Pa.) 13 Wkly. Notes Cas. 154 (Id.); Williams v. Connor, 14 S. C. 621 (Id.); Craft v. McConoughy, 79 Ill. 346 (combination to prevent competition in trade); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (Id.); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (Id.). Cf. Fairbank v. Newton, 50 Wis. 628, 7 N. W. 543. A curious instance of a partnership between two highwaymen is said to have come before the courts in the last century. As the case is not to be found in the reports, an abridged note of it is given here taken from Lindl. Partn. p. 94. There is some doubt whether it actually occurred. Real or fictitious, it is a good illustration of an illegal partnership of the class in question: "Everet v. Williams (2 Poth. Obl., by Evans, p. 3, note citing 2 Europ. Mag., 1787, p. 360) is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets, and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz. at Bagshot, Salisbury, Hampstead, and elsewhere to the amount of £2,000 and upward. The rest of the bill was in the

[84] Lindl. Partn. p. 94; Williams v. Jones, 5 Barn. & C. 108. See Mitchell v. Cockburne, 2 H. Bl. 379; Booth v. Hodgson, 6 Term R. 405; Lees v. Smith, 7 Term R. 338; Everth v. Blackburne, 2 Starkie, 66; Ex parte Bell, 1 Maule & S. 751; Aubert v. Maze, 2 Bos. & P. 371; Watts v. Brooks, 3 Ves. 612; Knowles v. Haughton, 11 Ves. 168.

mere fact that one or more members of such a partnership are disqualified will not render the partnership illegal if the business is, in fact, carried on by persons duly qualified.[85] There is no presumption that the disqualified one was to perform any part of the duties for which he was disqualified. Thus, where a statute prohibits a lawyer or a physician not licensed from practicing, a partnership between him and a licensed practitioner is not illegal, if his share of the profits is not in consideration of his practicing.[86] But where a sheriff is forbidden to buy county scrip, but he does it indirectly, by forming a partnership for that purpose, the partnership is illegal.[87]

A partnership may be illegal upon the general ground, that it is formed for a purpose forbidden by the current notions of morality, or public policy. A partnership, for example, formed for the purpose of deriving profit from the sale of obscene prints, or for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal.[88] In the time of Charles II. it seems to have been held that a contract for sharing the profits derived from the public exhibition of a human monster was illegal;[89] this decision would not probably now be followed. While two countries are at war, it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other. A partnership, therefore, formed between persons resident in this country

ordinary form for a partnership account. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 apiece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported. See 20 Eq. 230, note. The case was referred to by Jessel, M. R., in [Sykes v. Beadon] 11 Ch. Div. 195."

[85] Lindl. Partn. p. 95; Raynard v. Chase, 1 Burrows, 2; Candler v. Candler, Jac. 225, 6 Madd. 141; Sterry v. Clifton, 9 C. B. 110; Turner v. Reynall, 14 C. B. (N. S.) 328; Harland v. Lilienthal, 53 N. Y. 438.

[86] Scott v. Miller, Johns. Eng. Ch. 220.

[87] Read v. Smith, 60 Tex. 379.

[88] Sterry v. Clifton, 9 C. B. 110 (sale of offices); Pare v. Clegg, 29 Beav. 589, and Thornton v. Haw, 8 Jur. (N. S.) 663 (associations for promulgating irreligious opinions).

[89] See Herring v. Walround, 2 Ch. Cas. 110. The thing exhibited was a pair of female children, having "two heads, four arms, four legs, and but one belly, where their two bodies were conjoined."

for the purpose of trading with an enemy's country, is illegal; and a fortiori is such a partnership illegal if one of the members of it is resident in that country, and is therefore an alien enemy.[90] But a partnership in this country for running a blockade established by one belligerent nation in the ports of another is not illegal; for, subject to the risk of capture, a neutral may lawfully trade with a belligerent.[91] Public policy does not permit of a partnership in a public office, such as the office of sheriff,[92] prosecuting attorney,[93] executor or administrator,[94] and the like.[95] On a sale of public lands, it is not unlawful for individuals to associate together to purchase for their joint interest.[96] But a combination to prevent competition between bidders on a public contract is illegal, though in the guise of a partnership.[97] A combination of manufacturers and dealers, formed solely to enhance the price of articles manufactured and dealt in, for the benefit of its members, cannot sue, in the name adopted by it for the transaction of business, as a co-partnership, since it is illegal.*

[90] Evans v. Richardson, 3 Mer. 469; Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, Id. 285. See Brandon v. Nesbitt, 6 Term R. 23; McAdams' Ex'rs v. Hawes, 9 Bush (Ky.) 15; Pfeuffer v. Maltby, 54 Tex. 454 (trading in Confederate money); Anderson's Adm'r v. Whitlock, 2 Bush (Ky.) 398 (Id.). Generally, as to effect of war, see Prize Cases, 2 Black, 635; The Cheshire, 3 Wall. 231.

[91] Ex parte Chavasse, 4 De Gex, J. & S. 655; The Helen, L. R. 1 Adm. & Ecc. 1.

[92] Jons v. Perchard, 2 Esp. 507.

[93] Gaston v. Drake, 14 Nev. 175.

[94] Forsyth v. Woods, 11 Wall. 484; Seely's Adm'r v. Beck, 42 Mo. 143; Bowen v. Richardson, 133 Mass. 293.

[95] See generally Wolcott v. Gibson, 51 Ill. 69; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; Warner v. Griswold, 8 Wend. (N. Y.) 665; Gould v. Kendall, 15 Neb. 549, 19 N. W. 483.

[96] Piatt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115. See Dudley v. Little, 2 Ohio, 504.

[97] See King v. Winants, 71 N. C. 469; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124. Cf. Woodworth v. Bennett, 43 N. Y. 273; Breslin v. Brown, 24 Ohio St. 565. The business of furnishing recruits during the civil war was a lawful one, and the members of a partnership formed for that purpose had a right to agree, in their articles of co-partnership, that they would not come in competition with each other, or furnish recruits for less than a price fixed. Such an agreement can only be condemned on proof that it was made as part of a conspiracy to control

* Jackson v. Association, 53 Ohio St. 303, 41 N. E. 257.

Same—Effect of Illegality.

The law will not interfere between the members of an illegal partnership to compel an accounting or settlement of the partnership affairs.[98] Neither a division of the profits, nor contribution for losses, can be enforced. The law leaves the parties where it finds them. An agreement for an illegal partnership will not be enforced even if it has been partly performed.[99] So, no action lies to recover a premium agreed to be paid by defendant in consideration of being admitted to such a partnership.[100] In order, however, that illegality may be a defense, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks. It by no means follows, from the circumstance that money had been obtained in breach of some law, that, therefore, whoever is in possession of such money is entitled to keep it in his own pocket.[101]

prices or create a monopoly, and so against public policy, or that it was made for some other unlawful purpose. Marsh v. Russell, 66 N. Y. 288.

98 See Everett v. Williams, ante, note 83 ("accounting between highwaymen"). And see Craft v. McConoughy, 79 Ill. 346; Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, Id. 285; Sampson v. Shaw, 101 Mass. 145; Woodworth v. Bennett, 43 N. Y. 273; Durant v. Rhener, 26 Minn. 362, 4 N. W. 610; Watson v. Murray, 23 N. J. Eq. 257; Watson v. Fletcher, 7 Grat. (Va.) 1; Read v. Smith, 60 Tex. 379; Fairbank v. Leary, 40 Wis. 637; Northrup v. Phillips, 99 Ill. 449; Planters' Bank v. Union Bank, 16 Wall. 483. But see Brooks v. Martin, 2 Wall. 70. A part of the business being legal and a part illegal, in an action to wind up the court may take charge of and settle that part of the business which is legal, but not the part which is illegal. Anderson v. Powell, 44 Iowa, 20.

99 Ewing v. Osbaldiston, 2 Mylne & C. 53.

100 Williams v. Jones, 5 Barn. & C. 108.

101 There is considerable difference of opinion between the authorities as to how far the law will aid wrongdoers. Mr. Bates, in his work on Partnership (section 118), summarizes the result of the cases as follows: "(1) Accounting of the affairs of an illegal partnership. This is not granted by the courts. (2) Accounting of legal investments of the proceeds of a past and settled illegal partnership, the origin of the fund being foreign to the controversy. This is granted. (3) Compelling settlement of balances when the parties themselves have stated their own accounts, and nothing remains but to pay over. This is disputed." See, also, Woodworth v. Bennett, 43 N. Y. 273.

INTENTION TO BE PARTNERS — WHAT CONSTITUTES A PARTNERSHIP.

9. Whether or not a contract creates a partnership depends on the real intention of the parties.

Partnership, although often called a contract, is in truth the result of a contract; the relation which subsists between persons who have so agreed that the profits of a business enure to them as co-owners.[102] Whether an agreement creates a partnership or not depends on the real intention of the parties to it.[103] If the agreement is not in writing, the intention of the parties must be ascertained from their words

[102] It is remarkable how many writers have fallen into the error of referring to a partnership as "a contract," instead of the result of a contract. See definitions, note 1, supra, and other definitions, in Lindl. Partn. p. 3 et seq. Partnership is a relation; not a contract, but a result of one.

[103] "The true rule ex æquo et bono," says Judge Story, "would seem to be that the agreement and intention of the parties themselves should govern all cases * * * unless where the parties have held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story, Partn. § 49. It is to be regretted that the commentator should have thus introduced a disturbing element into otherwise so clear a statement of the rule, for the qualification confuses the subject. We will see hereafter that one who holds himself out as a partner earns, to be sure, a liability thereby, but does not become a partner. The other case—the case of fraud and deceit mentioned—does not amount to an exception to the rule by any means. Here is the old notion cropping out, as if the partnership liability was to be thrust upon some one as a penalty for his misdoings. It would seem as if it was in such a spirit of retributive justice that Lord Mansfield determined the case of Bloxham v. Pell, cited in 2 W. Bl. 999, and so laid the basis of so much discomfort for later judges. The simpler rule would be that there are no exceptions to the doctrine that the intention of the parties should govern in all cases, for fraud is always deliberate. If it is shown that persons who really are partners have practiced to delude creditors into the erroneous belief that they are not partners, there must have been already proof of the intention. It is by finding the intention that the fraud is uncovered. Intention was not formerly recognized as the test. Grace v. Smith, 2 W. Bl. 998; Cheap v. Cramond, 4 Barn. & Ald. 663; Waugh v. Carver, 2 H. Bl. 235. Where one does not allow the public or individual dealers to be deceived by the appearances of a partnership, the test of the existence of a partnership is the intention of the parties, as shown by their contract. Webster v. Clark, 34 Fla. 637, 16 South. 601.

and conduct.[104] If the agreement is in writing, its true construction must be determined. But it is the legal, rather than the declared, intention that controls.[105] If the parties intend and do those things

[104] As to evidence of partnership, see Lindl. Partn. p. 84; Bates, Partn. § 1134 et seq. Declarations of the party sought to be charged are admissible. 2 Greenl. Ev. p. 487; De Berkom v. Smith, 1 Esp. 29. "The partnership might be established by the several admissions of all those who were alleged to compose it, or by the admissions of one and the acts and declarations of the others. Welsh v. Speakman, 8 Watts & S. (Pa.) 257; Taylor v. Henderson, 17 Serg. & R. (Pa.) 453; Johnston v. Warden, 3 Watts (Pa.) 101. Nor does it at all affect this right of proof by the plaintiff, that there were in fact articles of co-partnership between the defendants." Reed v. Kremer, 111 Pa. St. 482, 5 Atl. 237. But declarations of an alleged partner not a party to the suit are not competent evidence. Martin v. Kaffroth, 16 Serg. & R. (Pa.) 120; Kirby v. Hewitt, 26 Barb. (N. Y.) 607. On an issue as to the existence of a partnership testimony of one alleged partner is admissible, his interest going only to his credibility and not to his competency. First Nat. Bank of Wausau v. Conway, 67 Wis. 210, 30 N. W. 215. On an issue of partnership, a witness cannot testify that he and defendant were partners, but must state the facts from which the legal conclusion is to be drawn. Omaha & Grant Smelting & Refining Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 853. Whether a partnership existed between two or more persons is, after the facts are ascertained, a question of law, but a witness who knows the fact may nevertheless state, in so many words, that they were partners. The party against whom the testimony is offered, if he thinks the statement is founded on opinion merely, should interrogate the witness as to the sources of his knowledge. McGrew v. Walker, 17 Ala. 824; Sankey v. Iron Works, 44 Ga. 228. It is not error, in an action between persons who sue as partners and a third party, to permit persons, whose business relations with the alleged partners are intimate, to testify as to the apparent relations between them, although the partnership may have been constituted by indentures or other writings. American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264. The declarations of one alleged partner that an alleged partnership exists, though not admissible against the other alleged partners, are properly admitted against the one making them. Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Armstrong v. Potter, 103 Mich. 409, 61 N. W. 657. A partnership may be created either by written or parol contract, or it may arise by the joint ownership, use, or enjoyment of the profits of the undivided property, real or personal. Ga. Code 1882, § 1887.

[105] Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048. The intention to become partners may be inferred in the case of individuals who claim sincerely that they never had such an intention. Leggett v. Hyde, 58 N. Y. 272; Duryea v. Whitcomb, 31 Vt. 395; Bigelow v. Elliott, 1 Cliff. 29, Fed. Cas. No. 1,399. "It is nevertheless possible for parties to intend no partnership, and yet to form one. If they agree upon an agreement which is a partnership in fact, it is of no importance

which the law declares constitute a partnership, then the parties are partners; and an express stipulation that they do not intend to form a partnership is of no avail.[106] It simply shows that they have mistaken the legal effect of the agreement which they intended to make. The objection that persons charged as partners had never intended to be partners was thus answered in a leading case: "What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did in-

that they call it something else; or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.' Kent, C. J., in Post v. Kimberly, 9 Johns. (N. Y.) 470, 504." Beecher v. Bush, 45 Mich. 188, 7 N. W. 785. In this case, speaking of the elements of partnership, Cooley, J., said: "And what are these? At the very least, the following: Community of interest in some lawful commerce or business for the conduct of which the parties eventually are principals of and agents for each other with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business." In any controversy between the parties themselves, the letter of their agreement prevails. London Assur. Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442. "A partnership inter se must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fixes the real status of the parties toward each other. If there is no agreement, then, if they deal with each other as partners, sharing losses and profits, their interest will be gathered from their acts, and they will be partners inter se. Colly. Partn. § 2, and note. A mere community of interest in property will not make the owners partners. There must be an agreement for the joint venture and to share profits and losses; and, in the absence of such a mutual agreement, they are mere tenants in common of the property, and the act of one will not bind the other." Sailors v. Printing Co., 20 Ill. App. 509. See, also, Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378; Manhattan Brass & Manuf'g Co. v. Sears, 45 N. Y. 797; Hitchings v. Ellis, 12 Gray (Mass.) 452; McDonald v. Matney, 82 Mo. 358; Dwinel v. Stone, 30 Me. 384; Lindl. Partn. (Wentw. Ed.) 10; Pooley v. Driver, 5 Ch. Div. 458.

[106] Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, and 38 Pac. 109; Moore v. Davis, 11 Ch. Div. 261.

tend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners." [107]

So, on the other hand, the mere fact that the parties themselves call their relation a partnership will not make it so. "Where the question of partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract; and, even though parties intend to become partners, yet, if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners in fact or in law. * * * The terms of the agreement, where there is one, fix the real status of the parties towards each other." [108]

Partnership a Mixed Question of Law and Fact.

The existence of a partnership is a mixed question of law and fact.[109] Where all the facts are admitted, it is for the court to say whether or not they constitute a partnership.[110] Thus, the court must say whether a written agreement renders the parties to it partners.[111] But, where the facts are in dispute, the court will instruct the jury as to what facts will constitute a partnership, and it is for the jury to say whether or not a partnership exists; [112] or, if a special verdict is de-

[107] Pooley v. Driver, 5 Ch. Div. 458, 483.

[108] Sailors v. Printing Co., 20 Ill. App. 509.

[109] Lindl. Partn. 83; Bates, Partn. § 1135; Fox v. Clifton, 9 Bing. 117; Everitt v. Chapman, 6 Conn. 347; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689. "Whether a partnership exists, is a question of fact; what a partnership is, is a question of law." T. Pars. Partn. § 6, citing Gabriel v. Evill, Car. & M. 358; Drake v. Elwyn, 1 Caines (N. Y.) 184; Beecham v. Dodd, 3 Har. (Del.) 485; Doggett v. Jordan, 2 Fla. 541; Everitt v. Chapman, 6 Conn. 347; Terrill v. Richards, 1 Nott & McC. (S. C.) 20.

[110] Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614; Everitt v. Chapman, 6 Conn. 347; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74.

[111] Boston & C. Smelting Co. v. Smith, 13 R. I. 27.

[112] Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614; McGrew v. Walker, 17 Ala. 824; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Everitt v. Chapman, 6

sired, the jury will determine what the facts really are, and the court will then determine whether or not such facts constitute a partnership.

SAME—DEVELOPMENT OF MODERN DOCTRINE.

10. The development of the modern doctrine will be considered with reference to the three leading cases of

(a) Grace v. Smith (p. 34).

(b) Waugh v. Carver (p. 35).

(c) Cox v. Hickman (p. 37).

11. GRACE v. SMITH—"Every man who has a share of the profits of a trade ought also to bear his share of the loss."

In the year 1775, De Grey, C. J., laid down the proposition in Grace v. Smith [113] that "every man who has a share of the profits of a trade, ought also to bear his share of the loss." The reason assigned was that, "if any one takes part of the profit, he takes a part of that fund upon which the creditor of the trader relies for his payment." This case has always been regarded as the great authority for the proposition that a person who shares profits is liable to third parties as if he were, in fact, a partner. The judgment itself appears to have been based upon the prior case of Bloxham v. Pell, before Lord Mansfield, and in substance undistinguishable from Grace v. Smith. In Bloxham v. Pell an outgoing partner became entitled to be paid by the continuing partner a certain sum of money, with interest at 5 per cent., and also an annuity of £200 a year for six years, in lieu of the profits of the trade. The plaintiff sued him for a debt contracted after the dissolution, and Lord Mansfield held the defendant liable, on the ground that the agreement was a device to make more than legal interest of money,

Conn. 347; Dulany v. Elford, 22 S. C. 308; Waggoner v. Bank, 43 Neb. 84, 61 N. W. 112.

[113] 2 W. Bl. 998, 1000. The reason for the peremptory nature of the rule, viz. "that by taking part of the profits he takes from the creditors a part of the fund which is the proper security to them for the payment of their debts," places the question of partnership or no partnership upon a false footing, for creditors do not look to profits for security for their debts at all. Lindl. Partn. 7; J. Pars. Partn. § 54.

and, if it was not a partnership, it was a crime, and it should not lie in the defendant Pell's mouth to say it was usury, and not a partnership. Lord Mansfield did not say a word in favor of the doctrine laid down in Grace v. Smith; but seeing a contract which, on the ground of usury, was invalid as a contract of loan, he, nevertheless, upheld it as a contract of partnership, which it plainly was not, but which was the only alternative if the agreement was to be upheld at all.[114]

12. WAUGH v. CARVER—This case established the doctrine that all persons who shared the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated.

In 1793, 18 years after the decision of Grace v. Smith, the celebrated case of Waugh v. Carver[115] was decided. In this case, two ship agents, carrying on business at different ports, agreed to allow each other certain portions of each other's commissions and profits; but it was expressly agreed that neither of them should be prejudiced or affected by the losses of the other, or be answerable for the acts of the other, but each should be answerable and accountable for his own losses and acts. It was admitted by the court that this agreement created no partnership as between the parties to it; but it was nevertheless held, on the principle enunciated in Grace v. Smith, that both parties to the agreement were answerable for the business debts of each, and a creditor who sued both for goods supplied to one obtained judgment against both accordingly.

Applications of the Foregoing Doctrines.

Other cases, in which the same principle was applied, need only be shortly referred to. It was held that a partnership as to third persons subsisted between merchants who divided the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other.[116] So between persons who agreed

114 Cited in Grace v. Smith, 2 W. Bl. 999. See Jestons v. Brooke, 2 Cowp. 793. "The loan does not become a partnership because the interest is usurious." J. Pars. Partn. § 66; Gilpin v. Enderbey, 5 Barn. & Ald. 954.

115 2 H. Bl. 235; 2 Smith, Lead Cas. (9th Ed.) 1178.

116 Cheap v. Cramond, 4 Barn. & Ald. 663.

to share the profits of a single isolated adventure;[117] and between persons one of whom was in the position of a servant to the others, but was paid a share of the profits instead of a salary;[118] and between persons, one of whom was paid an annuity out of the profits made by the others,[119] or an annuity in lieu of any share in those profits.[120] So between the vendor and purchaser of a business, if the former guarantied a clear profit of so much a year, and was to have all profits beyond the amount guarantied.[121] Moreover, the character in which a portion of the profits was received did not affect the result; for a person who, as executor or trustee, merely employed money in trade or business, and shared the profits arising from it, incurred all the liabilities of a partner, although he in fact had personally no interest whatever in the matter.[122] On the other hand, the cestuis que trustent were also liable, the creditors having an option against which of the two they would proceed.[123] Again, persons who shared profits were partners as to third persons, although their community of interest was confined to the profits. In Smith v. Watson,[124] a broker, who was paid by a share of the profits arising from the sales made by him, and who was therefore, as to third persons, a partner with the person employing him, was, nevertheless, held to have no interest in the goods sold.

Distinction between Sharing Profits and Gross Returns—Payments Varying with Profits.

But, notwithstanding the extent to which the doctrine laid down in Grace v. Smith was carried, it was long ago established that persons who shared only gross returns were not partners even as to third persons; and subtle distinctions were taken between a pay-

117 Hesketh v. Blanchard, 4 East, 144; Ex parte Gellar, 1 Rose, 297; Heyhoe v. Burge, 9 C. B. 431.

118 Ex parte Digby, 1 Deac. 341; Ex parte Rowlandson, 1 Rose, 92.

119 In re Colbeck, Buck, 48; Ex parte Hamper, 17 Ves. 412; Ex parte Chuck, 8 Bing. 469;

120 Bloxham v. Pell, cited in Grace v. Smith, 2 W. Bl. 999.

121 Barry v. Nesham, 3 C. B. 641. Cf. Pott v. Eyton, Id. 32.

122 Ex parte Garland, 10 Ves. 119; Labauchere v. Tupper, 11 Moore, P. C. 198; Wightman v. Townroe, 1 Maule & S. 412.

123 See Goddard v. Hodges, 1 Cromp. & M. 33.

124 2 Barn. & C. 401.

ment out of profits and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits not as profits, but as something else.[125]

13. COX v. HICKMAN—Persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally, or by others as their real or ostensible agents.

The doctrine as to profit sharing first enunciated in Grace v. Smith, and firmly established by Waugh v. Carver,[126] remained unshaken until 1860, when the case of Cox v. Hickman [127] was decided.

[125] Under the doctrine of Waugh v. Carver, 2 H. Bl. 235, in any apparent case of a sharing of profits the only mode of escape lay in showing that it was a payment, not out of, but varying with, profits that the party enjoyed. This distinction was developed from Grace v. Smith, 2 W. Bl. 997, and its predecessor, Bloxham v. Pell (cited in 2 W. Bl. 998, 999), and arose in this way: In each of these cases an outgoing partner was to be paid the principal and interest of the money he had in the business, and, besides, an annuity in lieu of profits. An estimate of the figures involved in such an arrangement would, in case of a simple loan, have made an usurious contract apparent; and in Bloxham v. Pell Lord Mansfield rather arbitrarily decided the defendant to be liable as a partner, inasmuch as, in order to escape a civil liability, he would have to admit the commission of a crime, which it did not lie in his mouth to do. Thus, no case being allowed to be made out contra, a sharing of profits appeared unmixed with any other question, and a partnership liability resulted. But in Grace v. Smith the jury, although being advised of this principle, found in favor of the defendant; and De Grey, J., declined to disturb the verdict respecting the right of the jury to find facts, and inferring that they had found the payment not to have actually come out of the profits. Subsequently Lord Eldon in Ex parte Hamper, 17 Ves. 412, confronted by these two opinions in the case before him, found it necessary to reconcile them; and so reluctantly announced that a distinction existed between a payment out of profits and a payment varying with profits. It is hard to conceive of an instance better serving to show the embarrassment that excessive technicality may give to jurisprudence. It can be readily understood that the courts were eager for some new test to appear, by which the existence of a partnership could be determined without recourse to such flimsy distinctions.

[126] Grace v. Smith, 2 W. Bl. 997; Waugh v. Carver, 2 H. Bl. 235.

[127] 8 H. L. Cas. 268. See, also, same case, 3 C. B. (N. S.) 523, 18 C. B. 617.

This case, while not professing to overrule the earlier cases, certainly overturned the former doctrine of a partnership as to third persons growing out of the mere fact of profit sharing, and placed a great branch of partnership law on a basis of sound principle. It is difficult to assign any sound reason why the mere fact of profit sharing should impose the extensive liability of a partner. The reason given in Grace v. Smith, viz. that, "by taking a part of the profits, he takes from the creditors a part of that fund, which is the proper security to them for the payment of their debts," is an insufficient, if not an absurd, reason. It the first place, profits are not a fund for the payment of debts. The existence of debts is inconsistent with the existence of profits, for profits are what remains after all debts have been paid.[128] Moreover, it is difficult to understand why a person lending money at a fixed rate of interest should be treated as a creditor, and be exposed to no risk beyond the loss of his advance; while a person lending money at a rate of interest fluctuating with and payable out of the profits of the borrower should be treated as a partner, and be exposed, not only to the loss of his money, but also to the loss of whatever else he might have in the world.[129]

The principle established in Cox v. Hickman, stated above in black letter, brought this anomalous class of cases into accord with the general principles of liability at common law, and recognized the true nature of a partnership. Under the principles there laid down, partners, of course, remain liable for their own acts. They are liable for the acts of their co-partners because, as between themselves, they are each an agent of all the others. The idea of a partnership as to third persons distinct from a partnership inter se is abandoned; and unless the relation really exists as between themselves,

[128] "The injustice of this doctrine of partnership as to third persons has been more or less deplored by text writers. Moreover, the illogical and untruthful foundation upon which the doctrine rests is now pretty well understood. Persons held liable as partners to third persons did not take part of the fund upon which creditors relied, any more than did a salaried agent, and in fact less so; for when a partnership was unable to pay its debts it was because there were no profits, and in that case such person took nothing; whereas, had his compensation been definite, the fund would have been diminished." Bates, Partn. § 15.

[129] Lindl. Partn. p. 26.

so as to make them all agents for each other, persons are not liable as partners, although they share profits.[130] This case arose out of the financial embarrassment of B. Smith & Co., who, being largely and variously indebted, entered into a deed with their creditors to the end that the latter should be paid. Under this deed, the business was to be thenceforth carried on as the "Stanton Iron Company," by trustees, who were to pay all the creditors out of the net income of the business (which net income was meantime to be deemed the property of the Smiths), and to hold the business, after the satisfaction of the debts, in trust for the Smiths. A majority in value of the creditors were to make such rules as might be necessary for the management of the business, and had the option to discontinue it if they should see fit. Cox and Wheatcroft were of the trustees named, but Cox never acted, and Wheatcroft resigned six weeks after his appointment. Subsequently, an indebtedness was incurred by the Stanton Iron Company with Hickman, for the amount of which Hickman drew on said company, and the drafts were accepted, in these words: "At Messrs. Smith, Payne & Co.,

[130] "This case, decided in the highest court of England, was at once the end of the old theory of partnership, and the starting point of a new doctrine. It put an end to two notions which had been regarded as fundamental: First, that third persons may hold to the liability of partners those who in fact are not partners, merely because some other relation exists between them; second, that participation in the profits of a business is conclusive of a partnership. The case did not, however, offer any alternative test of a partnership; for the suggestion of the necessity of an agency is of no assistance in a doubtful case. The agency is the result of the partnership, not vice versa." T. Pars. Partn. § 43. See, also, Holme v. Hammond, L. R. 7 Exch. 218, 233. Story, in his work on Partnership, so early as 1841, says of a partner: "So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either." Section 1. The principle of Cox v. Hickman, 8 H. L. Cas. 268, was, therefore, not a new one. The above quotation from Story was cited by Wensleydale in his opinion in that case, and the same principle was introduced into other cases not so prominent before Cox v. Hickman. See Beckham v. Drake, 9 Mees. & W. 79; Wilson v. Whitehead, 10 Mees. & W. 503; Ernest v. Nicholls, 6 H. L. Cas. 400.

London. Per proc. The Stanton Iron Company. James Haywood." "The question," says Lord Wensleydale, in considering the case in the house of lords, "is whether either of the defendants, Cox or Wheatcroft, was liable as acceptor of certain bills of exchange, dated in March, April, and June, 1855, drawn by the plaintiff below on the Stanton Iron Company, and accepted by one James Haywood as per proc. that company. And the simple question will be this: whether Haywood was authorized by either of the defendants, as a partner in that company, to bind him by those acceptances." "It is often," observed Lord Cranworth, "said that the test, or one of the tests, whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i. e. that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the cred-

itors."[131] "The law," said Lord Wensleydale, "as to partnership, is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. * * * A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject [Waugh v. Carver, etc.], is only the consequence, not the cause, why a man is made liable as a partner. Can we, then, collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and, by the mere signature of the deed, constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade, for, if it is profitable, they may get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner."

In the later case of Bullen v. Sharp,[132] Blackburn, J., in commenting on this case, said: "Prior to that decision, the dictum of De Grey, C. J., in Grace v. Smith, 'that every man who has a share of the

[131] His lordship then proceeded to show that Waugh v. Carver, 2 H. Bl. 235, Bond v. Pittard, 3 Mees. & W. 357, and Barry v. Nesham, 3 C. B. 641, applying to them the test enunciated by him, were correctly decided.

[132] L. R. 1 C. P. 86.

profits of a trade ought also to bear a share of the loss,' had been adopted as the ground of judgment in Waugh v. Carver, where it was laid down 'that he who takes a moiety of all profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.' This decision had never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time; and when, more recently, it was disputed, it was a common opinion (in which I, for one, participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. In Cox v. Hickman the creditors of a trader had agreed that their debtor's trade should be carried on for the purpose of paying them their debts out of the profits, and the composition deed to which they were parties secured to them a property in the profits. The rule laid down in Waugh v. Carver, if logically followed out, led to the conclusion that all the creditors who assented to this deed, and, by so doing, agreed to take the profits, were individually liable as partners; but, when it was sought to apply the rule to such an extreme case, it was questioned whether the rule itself was really established. There was a very great difference of opinion among the judges who decided the case in its various stages below, and also among those consulted in the house of lords. In the result, the house of lords (consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale, and Chelmsford) unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the ratio decidendi. * * * I think that the ratio decidendi is that the proposition laid down in Waugh v. Carver—viz. that a participation in the profits of a business does of itself, by operation of law, constitute a partnership—is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on, on behalf

of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."[133]

Bovil's Act.

The reasoning in Cox v. Hickman has been widely adopted by the courts of the several states of the Union, as well as by the supreme court of the United States; so that, with a slight reservation, it may be said that the rule is general here.[134] The courts of some of the

[133] It was said by Lord Cranworth in the house of lords during the consideration of Cox v. Hickman, 8 H. L. Cas. 268: "The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, and all are therefore liable for the ordinary trade contracts of the others."

[134] U. S. Sup. Ct. Share of profits as interest: Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972; Id., 29 Fed. 276. Share of the profits to widow and children or from money left in business by deceased: Jones v. Walker, 103 U. S. 444. See, also, In re Francis (1872) 2 Sawy. 286, Fed. Cas. No. 5,031; In re Ward (1879) 2 Flip. 462, Fed. Cas. No. 17,144.

Alabama. Services: Randle v. State, 49 Ala. 14. Rent: McDonnell v. House Co., 67 Ala. 90.

Arkansas. Interest: Culley v. Edwards, 44 Ark. 423.

Canada. Rent: Haydon v. Crawford, 3 U. C. Q. B. (O. S.) 583; Hawley v. Dixon, 7 U. C. Q. B. 218; Great Western R. Co. v. Preston & B. R. Co., 17 U. C. Q. B. 477.

California. Services: Wheeler v. Farmer, 38 Cal. 203. Rent: Quackenbush v. Sawyer, 54 Cal. 439.

Colorado. Services: Le Fevre v. Castagnio, 5 Colo. 564.

Connecticut. Services: Loomis v. Marshall, 12 Conn. 69; Parker v. Canfield, 37 Conn. 250. Annuity, etc.: Pitkin v. Pitkin, 7 Conn. 307.

District of Columbia. Services: Vinson v. Beveridge, 3 MacArthur, 597.

Georgia. Rent: Contra, Dalton City Co. v. Dalton Manuf'g Co., 33 Ga. 243; Holifield v. White, 52 Ga. 567; Adams v. Carter, 53 Ga. 160.

Illinois. Services: Parker v. Fergus, 43 Ill. 437; Burton v. Goodspeed, 69 Ill. 237. Interest: Niehoff v. Dudley, 40 Ill. 406; Smith v. Vanderburg, 46 Ill.

states have been necessarily more tardy than those of others in adopting the rule, but all are in the line of progress towards making it

34; Lintner v. Millikin, 47 Ill. 178. See Smith v. Knight, 71 Ill. 148. Rent: Parker v. Fergus, 43 Ill. 437; Smith v. Vanderburg, 46 Ill. 34.

Indiana. Services: Ellsworth v. Pomeroy, 26 Ind. 158. Rent: Keiser v. State, 58 Ind. 379. See Macy v. Combs, 15 Ind. 469.

Iowa. Services: Holbrook v. Oberne, 56 Iowa, 324, 9 N. W. 291; Price v. Alexander, 52 Am. Dec. 526. Rent: Reed v. Murphy, 2 G. Greene, 574. See Williams v. Soutter, 7 Iowa, 435.

Kansas. Services: Shepard v. Pratt, 16 Kan. 209.

Kentucky. Services: Donley v. Hall, 5 Bush, 549. Contra, Miller v. Hughes, 1 A. K. Marsh. 181.

Louisiana. See Chaffraix v. Lafitte, 30 La. Ann. 631.

Maine. Share of profits in payment of services of employé: Bigelow v. Elliot, 1 Cliff. 28, Fed. Cas. No. 1,399; Holden v. French, 68 Me. 241. Share of profits as rent: Thompson v. Snow, 4 Me. 264; Bridges v. Iron Co., 57 Me. 543.

Maryland. Services: Taylor v. Terme, 3 Har. & J. 505; Rowland v. Long, 45 Md. 439. Annuity, etc.: Heighe v. Littig, 63 Md. 301.

Massachusetts. Services: Holmes v. Railroad Co., 5 Gray, 58; Com. v. Bennett, 118 Mass. 443. Rent: Holmes v. Railroad Co., 5 Gray, 58; La Mont v. Fullam, 133 Mass. 583.

Michigan. Services: Morrison v. Cole, 30 Mich. 102. Rent: Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; Thayer v. Augustine, 55 Mich. 187, 20 N. W. 898. See Colwell v. Britton, 59 Mich. 350, 26 N. W. 538.

Missouri. Annuity, etc.: Philips v. Samuel, 76 Mo. 657. See Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Kelly v. Gaines, 24 Mo. App. 506; Campbell v. Dent, 54 Mo. 325.

Montana. Interest: Hunter v. Conrad (Mont.) 44 Pac. 523. See Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588.

Nebraska. Services: Strader v. White, 2 Neb. 348.

Nevada. Services: Mason v. Hackett, 4 Nev. 420.

New Hampshire. Services: Newman v. Bean, 21 N. H. 93. See Eastman v. Clark, 53 N. H. 276 (elaborate opinion reviewing cases). Cf. earlier case of Bromley v. Elliot, 38 N. H. 287.

New Jersey. Rent: Perrine v. Hankinson, 11 N. J. Law, 181. See Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295; Brundred v. Muzzy, 25 N. J. Law, 268.

New York. Services: Cassidy v. Hall, 97 N. Y. 159; Prouty v. Swift, 51 N. Y. 594. Interest: Leggett v. Hyde, 58 N. Y. 272; Orvis v. Curtiss, 12 Misc. Rep. 434, 33 N. Y. Supp. 589; Richardson v. Hughitt, 76 N. Y. 55; Curry v. Fowler, 87 N. Y. 33; Cassidy v. Hall, 97 N. Y. 159. Rent: Dake v. Butler, 7 Misc. Rep. 302, 28 N. Y. Supp. 134; Heimstrut v. Howland, 5 Denio, 68. Defendant and R. entered into an agreement by which R. agreed to negotiate the sale of defendant's promissory notes in a certain amount, according to defend-

universal. Among the tardy courts in this respect have been those notably of the states of New York and Pennsylvania.* In the former

ant's financial requirements, receiving as compensation a commission of two-thirds of 1 per cent., a brokerage of one-fourth of 1 per cent., and 25 per cent. of the net profits of defendant's business. The agreement was to continue for one year unless sooner terminated by mutual consent, or by either party on 30 days' notice. R. was to have no part in the management of the business, and his share in the profits was to terminate with the termination of his employment. Held, that this agreement did not create a partnership, so as to render R. liable for debts incurred by defendant in the business. Winne v. Brundage (Sup.) 40 N. Y. Supp. 225.

North Carolina. Services: Mauney v. Coit, 86 N. C. 463; Day v. Stevens, 88 N. C. 83. A lessor of property by a contract under which he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed does not become liable as a partner of the lessee. N. C. Code 1883, § 1744.

Ohio. Services: McArthur v. Ladd, 5 Ohio, 514. Rent: Johnson v. Miller, 16 Ohio, 431. See Harvey v. Childs, 28 Ohio St. 319.

Pennsylvania. Services: Edwards v. Tracy, 62 Pa. St. 374; Dale v. Pierce, 85 Pa. St. 474. Interest: Eshleman v. Harnish, 76 Pa. St. 97; Lord v. Proctor, 7 Phila. 630; Wessels v. Weiss, 166 Pa. St. 490, 31 Atl. 247; Hart v. Kelley, 83 Pa. St. 286; Irwin v. Bidwell, 72 Pa. St. 244. Rent: Brown v. Jaquette, 94 Pa. St. 113. By the law of Pennsylvania any person may loan money to any individual, firm, or corporation upon agreement to receive a share of the profits in lieu of interest, and such agreement shall not render him a partner as against creditors, except as to money so loaned, provided such agreement be in writing, and that he does not hold himself out as a partner or induce credit to be given to the firm. Pepper & L. Pa. Dig. "Partnership" § 16. Individuals and corporations may give a share of the profits to employés in lieu of wages without rendering them partners, either as against creditors or between each other. Pepper & L. Pa. Dig. "Partnership," § 17.

Rhode Island. Interest: Boston & C. Smelting Co. v. Smith, 13 R. I. 27.

South Carolina. Services: Chapman v. Lipscomb, 18 S. C. 233.

Tennessee. Services: Polk v. Buchanan, 5 Sneed, 721.

Texas. Services: Buzard v. Bank, 67 Tex. 83, 2 S. W. 54. Interest: Id.

Vermont. Share of profits in payment of services of employé: Morgan v. Stearns, 41 Vt. 398. Rent: Tobias v. Blin, 21 Vt. 544; Felton v. Deall, 22 Vt. 170.

Virginia. Services: Wilkinson v. Jett, 7 Leigh, 115. Rent: Bowyer v. Anderson, 2 Leigh, 550.

West Virginia. Rent: Chapline v. Conant, 3 W. Va. 507.

* In the recent case of Wessels v. Weiss, 166 Pa. St. 490, 36 Wkly. Notes Cas. 111, 31 Atl. 247, decided in 1895, the court said: "The agreement between the defendants made them partners at common law and in this state. The case

of the states named, the court, in one case,[135] insisted that the leading cases in Great Britain [136] that have marked the departure from the

of Waugh v. Carver, 2 H. Bl. 235, decided in 1793, which followed Grace v. Smith, 2 W. Bl. 998, decided in 1775, was followed and adopted to its full extent in Purviance v. McClintee, 6 Serg. & R. 259, in 1820. The well-settled rule of Waugh v. Carver was overruled in England in 1860 by the case of Cox v. Hickman, 8 H. L. Cas. 268, but there has been no departure from it in this state, except by legislation in 1870. In the opinion in Edwards v. Tracy, 62 Pa. St. 374, decided in 1869, Sharswood, J., pointed out the new English rule of Cox v. Hickman, but followed the old one of Waugh v. Carver, saying: 'It is entirely too late now to question either the rule or the exception. We are bound to stand super antiquas vias by our own decided cases.' In the opinion in Lord v. Proctor, 7 Phila. 630, decided at nisi prius the same year, he said that the rule in Waugh v. Carver was too ancient a landmark in our law to be now disturbed, and that it had accordingly been followed in Edwards v. Tracy. Since the act of 1870, there has been no change in judicial decision." The points decided in this case were as follows: Where a person loans a merchant money, for which he is to receive, at a specified rate, interest, and, in addition thereto, a certain per cent. of the net profits of the business, he becomes a partner at common law. Act April 6, 1870 (P. L. 56), provides that a loan of money upon an agreement to receive a share of the profits of the business in lieu of interest shall not make the lender liable as a partner except as to the money loaned, provided the agreement be in writing, and the party shall not hold himself out as a general partner. Held, that where the lender agrees to receive a share of the profits of the business of the borrower, and interest in addition thereto, and the agreement as to the interest is not in writing, such statute does not apply. See, also, Merrall v. Dobbins, 169 Pa. St. 480, 32 Atl. 578.

[135] Leggett v. Hyde, 58 N. Y. 272. In Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745, Stanley agreed to loan Gorham $750 for use in his business, taking Gorham's note for said amount and interest, with collateral security; and in consideration of this and of any further advances he might make, at his own option, and of his services in securing sales in the business, he was to be given a share, to wit, one-half, of the profits. Any advance to the business made by either of the parties was to bear interest while employed, and could be withdrawn at the option of the party advancing it. Stanley was to be given quarterly true statements of the condition of the business. On the theory of Leggett v. Hyde, Stanley was held to be a partner. "Prior to Cox v. Hickman, there was no question at all but that any one 'sharing in the profits,' even though without intention to be a partner, would be held to be a partner as to third persons. This rule was universally adopted both in England and America. The judges in Cox v. Hickman hardly realized what a revolution they were making, and for

[136] Cox v. Hickman, 8 H. L. Cas. 268; Bullen v. Sharp, L. R. 1 C. P. 86; Holme v. Hammond, L. R. 7 Exch. 218.

old theories in regard to the test of the partnership relation resulted, not from Cox v. Hickman, but from legislation had in England subsequently to the decision of that case; and the court went on to say

this reason some American courts have refused to follow it; and yet its force is felt in every American court, even though some of such courts repudiate the case itself. The logical result of Cox v. Hickman was to abolish all differences between partnership inter sese and partnership as to third parties in every instance except that of estoppel. A good many American courts, realizing that this is the true rule, have adopted the result fully. There are two cases in which the rule and results of Cox v. Hickman have been elaborately discussed by able American judges. Eastman v. Clark, 53 N. H. 276; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785. In New York, however, we find a deliberate recognition of the rule of Grace v. Smith and Waugh v. Carver. So, also, we find a recognition in some of the older cases of the distinction between sharing in 'gross returns' and 'net profits.' Up to 58 N. Y. we find the law in New York almost precisely like the law in England down to the time of Cox v. Hickman, the chief exception being that, where a man was to have a certain share of the profits for the sole purpose of compensating him for his services, he was held not to be a partner, although sharing the profits. The case of Cox v. Hickman was first considered in New York, and dismissed and repudiated in terms by Folger, J., in Leggett v. Hyde, 58 N. Y. 272. But, though claiming to repudiate Cox v. Hickman, yet its influence was continually to be seen in the New York decisions, which held, at various times, that where a man (1) gets compensation for property advanced or delivered, or (2) for money loaned, or (3) for services rendered, by sharing in the profits, such 'sharing in the profits' alone would not constitute the man a partner. So it seemed that, while still declining to follow Cox v. Hickman, yet the New York courts were gradually abandoning the old English rule, and working unconsciously up to the new one. The intermediate cases disclosing this change are noted and discussed in Cassidy v. Hall, 97 N. Y. 159. See, also, Burnett v. Snyder, 81 N. Y. 550, where the court in terms denies Cox v. Hickman, but adopts its substantial results. After the latter decision, the opinion generally prevailed that the rule of Cox v. Hickman was tacitly, yet plainly, the rule adopted by New York. But this opinion was shaken, and the law thrown back into the state of confusion that it was in after Judge Folger's decision in Leggett v. Hyde, supra, by the opinion of Ruger, C. J. (declaring that Cox v. Hickman had never been acknowledged in New York, and that Grace v. Smith and Waugh v. Carver were still the recognized authorities), in the case of Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745. As a matter of fact, the facts of this case were such that, following either rule, the decision would have been the same in any event. Thus the law in New York on this question at the present day seems hopelessly confused, and will so remain until the court of appeals eventually clears it up, as it must do sooner or later." From Professor Collin's lectures before law class at Cornell University, 1892–93.

that, until similar legislation should be had in New York, it would have no warrant for making the same departure. In this the court was plainly in error.[137] "Bovil's Act," [138] to which it had reference, is for the most part merely declaratory of what was existing law at the time it passed, its fifth section being the only one that seemed to have added anything to the law. According to Lindley,[139] the act is remarkable rather for what it does not than for what it does contain; and, for this shortcoming, it has received unfavorable criticism at the hands of other authorities.[140] The force of Bovil's Act is mainly that the acceptance of shares of profits shall not of itself affect, with a partnership liability, persons in four several situations mentioned in the act. At the same time, it subjects those persons in two of these situations to some extent to the creditors of the trader. The persons so excepted from liability are (1) mere loaners of money under written contract, whose remuneration, in lieu of interest, arises out of or varies with the profits; [141] (2) employés who accept a share of profits in compensation for their services; (3) the widow or children of a deceased partner, who receive shares by way of an annuity; (4) the seller of the good will of the business, to whom has been given a share by way of annuity, in consideration of the sale. The fifth section modifies the first and fourth by making such loaners of money and such sellers of good will subordinate to other creditors of the trader in case the latter should become insolvent or bankrupt.

137 The several classes of recipients of profits covered by Bovil's act received recognition by the courts, and were held not to be partners without reference to the act. As to owners of money and employés of the trader their status has been declared by the New York court of appeals in very clear language in Cassidy v. Hall, 97 N. Y. 159. The right of a widow to receive profits by way of annuity without incurring liability was recognized so far back as Waugh v. Carver, 2 H. Bl. 235; Lord Chief Justice Eyre opening the opinion in that case with a reference to such right. The seller of the good will would seem to be entitled to protection when taking his share of profits, just as a retiring partner would be protected in a like case. See Grace v. Smith, 2 W. Bl. 998.

138 28 & 29 Vict. c. 86.

139 Lindl. Partn. 36. See, also, Pol. Dig. art. 7.

140 Sir George Jessel, in Pooley v. Driver, 5 Ch. Div. 471.

141 In Pennsylvania also such loaners of money are by statute declared not to be liable as partners. Act April 6, 1870 (P. L. 56).

Mutual Agency as a Test of Partnership.

It has been thought that Cox v. Hickman established mutual agency as a test of the existence of a partnership.[142] But, while it is conceded that partners are agents for each other, a slight con-

[142] Eastman v. Clark, 53 N. H. 276. For the purpose of determining whether a person is a partner in a trade firm, the test is whether the trade in question is carried on on behalf of the person who is sought to be charged as a partner. Hollom v. Whichelow, 64 Law J. Q. B. 170. Lindley says the effect of Cox v. Hickman was to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profit he shares unless he and they are really partners inter se, or unless they are his agents. Lindl. Partn. 34. There is quite a difference of opinion as to whether mutual agency is a final test of partnership. Sir George Jessel, in Pooley v. Driver, 5 Ch. Div. 458, dissented from the notion of its being such a test. According to him: "You do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating in other words that he must be a partner, inasmuch as every partnership involves this kind of agency; or, if he state that he is agent for the others, you state that he is a partner." In Holme v. Hammond, L. R. 7 Exch. 218, this disparity of views was presented very forcibly through the differing opinions of the members of the exchequer court by which the case was heard. Martin, B., there referring to Cox v. Hickman, said: "Lord Wensleydale and Lord Cranworth took part in the judgment, and it seems to me that the principle on which their opinions proceeded is correctly stated by O'Brien, J., in the case of Shaw v. Galt, 16 Ir. C. L. 357. He there expresses himself as follows: 'The principle to be collected from them appears to be that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others.'" But Cleasby, B., although concurring with the rest of the court on the main question there, criticises the passage above quoted from the opinion of Martin, B. "I must add, however," he remarks, "that I cannot quite concur in the passage cited by my Brother Martin from the judgment of O'Brien, J., in Shaw v. Galt, to the effect that the existence of partnership is to be ascertained by seeing whether each is principal and agent to and for the others. My view is that agency is deduced from partnership, rather than partnership from agency." Kelly, C. B., said: "In some of those cases the law of principal and agent has been referred to as governing the matter in question: but this branch of the law has really no bearing upon the case of partnership, except, indeed, that whenever a contract of partnership among commercial men exists, each partner is in point of law the agent for the others, and for the firm collectively, and they are bound by any contract he may enter into within the

sideration will show that mutual agency is not a test of partnership. Mutual agency is the result of partnership, not partnership the result of mutual agency.[143] This is well expressed in the case of Meehan v. Valentine,[144] as follows: "As has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency. * * * Such a test seems to give a synonym rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner who stands in the relation of principal to those by whom the business is actually carried on adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent."

Ownership of Profits the Ultimate Test of Partnership.

Cox v. Hickman established the proposition that partners are the agents of each other, but, for reasons just explained, mutual agency is not the test of a partnership. The ultimate and conclusive test of a partnership is the co-ownership of the profits of a business.[145]

scope of the partnership with reference to the nature of the undertaking, this agency being an incident to the contract of co-partnership."

[143] Meechem, Partn. § 66.

[144] 145 U. S. 611, 12 Sup. Ct. 972.

[145] In most of the later cases the courts have reached their conclusion through the application of the test above mentioned, viz. whether, as the effect of the evidence produced, it appears that the share of profits that the defendant took was taken because he had a proprietorship in them, or merely because it was paid over to him, or intended to be so paid, by way of compensation for something,—such as services performed, Rawlinson v. Clarke, 15 Mees. & W. 292; Ross v. Parkyns, L. R. 20 Eq. 331; Loomis v. Marshall, 12 Conn. 69; Hayward v. Barron (Com. Pl.) 19 N. Y. Supp. 383; Sohns v. Sloteman, 85 Wis. 113, 55 N. W. 158; Aetna Ins. Co. v. Bank (Neb.) 67 N. W. 449; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; or money or property or credit, Bullen v. Sharp, L. R. 1 C. P. 86; Dubos v. Jones, 34 Fla. 539, 16 South. 392; Ex parte Tennant, 6 Ch. Div. 303; Mollwo v. Court of Wards, L. R. 4 P. C. 419; Boston & C. Smelting Co. v. Smith, 13 R. I. 27; Cassidy v. Hall, 97 N. Y. 159; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972; or the letting of property, Lyon v. Knowles, 3 Best & S. 556; Holmes v. Railroad Co., 5 Gray (Mass.) 58; Dake v. Butler, 7 Misc. Rep. 302, 28 N. Y. Supp. 134; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; Brown v. Jaquette, 94 Pa. St. 113; or the use of effects, real or personal, by one

"If there is community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property

of two persons, but owned jointly, French v. Styring, 2 C. B. (N. S.) 366 (see Pol. Dig. art. 1); or otherwise where as is the case in these instances the proprietorship and the agent character do not meet in the same person, Kilshaw v. Jukes, 3 Best & S. 847. A contract between V. and G., trading as the S. M. Co., of the first part, and B., of the second part, recited that whereas the first parties were desirous of securing additional capital, and the second party was willing to contribute the amount desired on the terms that V. shall be the general manager at $15 per week, "and then, after the payment of all expenses in conducting the business of the company, the parties of the first part agree to pay to the party of the second part, for the use of the said $2,000, an amount equal to one-third of the net profits arising out of the business." Held, that such contract did not make B. a partner. Thillman v. Benton, 82 Md. 64, 33 Atl. 485. Where a merchant employs a person in his business, and agrees to pay him a stated salary, and, in addition, a certain percentage of the profits of the business, the contract does not constitute such merchant and the person so employed co-partners, as a matter of law. Stockman v. Michell (Mich.) 67 N. W. 336. Only the recipient of profits as the owner of them becomes liable as a partner. Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972. A proposition made by defendant to plaintiff to employ him "in my business," to pay "a stipulated salary," and "a sum of money equal to forty per cent." of certain specified sources of revenue, "you, as my employé, not to be liable for any losses (beyond your profits as stipulated)," and accepted by plaintiff, does not constitute a partnership, and, under the agreement, plaintiff is not liable for losses in the business, except as affecting his percentage of profit. Stafford v. Sibley (Ala.) 17 South. 324. Where there was an uncertainty as to whether the parties intended a joint interest in the profits, or only a common interest, the question of partnership was for the jury, the contract being in parol. Phillips v. Furniture Co., 92 Ga. 596, 20 S. E. 4. For an explanation of the peculiar sense in which the Georgia court uses the terms "joint" and "common" interest, see Sankey v. Iron Works, 44 Ga. 228. A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not. Ga. Code 1882, § 1890. "In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the

right in them from the start in one associate as much as in the other." [146] Stipulating for a compensation in proportion to the profits or payable out of them will not confer the privileges or impose the liabilities incident to a partnership, unless it confers a jus in re, as distinguished from a demand or chose in action. The reason for the distinction is that where a share of the profits earned under an agreement is taken by one because he is the owner of a proportionate part of the whole, and not because his associates owe him a debt of that amount, the parties are necessarily mutual agents, and hence partners, within the rule of Cox v. Hickman. This is because one cannot become, ipso facto, the owner of profits earned by another, unless that other is his agent in earning those profits. On the other hand, where a share of the profits earned under an agreement is merely a debt or personal claim by one party against his associates, growing out of services rendered, or the use of property, the parties are not mutual agents, and hence not partners. This is because, if the parties were mutual agents, the profits earned by one of them would necessarily belong ipso facto to all of them as principals, which is contrary to the hypothesis. If a party who himself earns profits is not entitled to them, or any part of them, as owner, but only as a debt due from another, it must be because he earned them in the capacity of employé or agent of that other solely, and not jointly for himself; and the relation is that of principal and agent, or master and servant, and not that of partnership.

partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership." Meehan v. Valentine, supra. "The rule is easily laid down. The difficulty is in its application. Where a part of the profits themselves is the property of the party, he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not belong to the party, there it is not a partnership." Henderson, C. J., in Cox v. Delano, 3 Dev. (N. C.) 89, 90.

[146] Bates, Partn. § 30. See, also, Mechem, Partn. § 68; J. Pars. Partn. § 54. Community of profits is the essence of a partnership. Griffen v. Cooper, 50 Ill. App. 257. If there is a community of interest in the profits, as such, of the

SAME—TESTS OF INTENTION.

14. The existence of an intention to form a partnership must be determined with a view to all the facts and circumstances, and not by any arbitrary tests. Various tests have been suggested, however, which will be discussed under the following heads:

(a) Agreements to share both profits and losses (p. 55).

(b) Agreements to share profits only (p. 58).

(c) Agreements to share gross returns (p. 63).

We have thus far learned that a partnership depends upon the consent and intention of the parties to be partners, and that an intention to be partners is nothing more or less than an intention to carry on a business and share the profits as joint owners. Various tests have been proposed by which the intention of the parties may be determined when not clearly expressed, but none of them are wholly satisfactory or conclusive. Judge Cooley says that, "so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied." [147] The intention must be sought in the whole contract, and all the circumstances of the case. It would be difficult to say just what acts and circumstances will prove the real situation and intention of the parties with reference to the profits. The fact of capital being invested in the business, the right of interference in the management, the participation in profits,—although,

business, and not by way of compensation for services rendered or capital loaned towards the prosecution of the business, it is sufficient to constitute a partnership. Waggoner v. Bank, 43 Neb. 84, 61 N. W. 112. Where persons enter into a trade arrangement giving them a community of interest in the capital stock engaged in the trade, and in the profits resulting therefrom, they are partners. Webster v. Clark, 34 Fla. 637, 16 South. 601. A contract reciting that in consideration of a salary of a certain amount per annum paid by the party of the first part (a firm) to the party of the second part, and a further consideration of a certain share in the net profits of the business of the firm, the party of the second part agreed to devote his time to their business as engineer, is a contract of employment, not of partnership. Porter v. Curtis (Iowa) 65 N. W. 824.

147 Beecher v. Bush, 45 Mich. 188, 200, 7 N. W. 785.

perhaps, no one of these indicia would control the settlement of the question, some or all of them would combine to make the proof complete.[148]

[148] See Cox v. Hickman, 9 C. B. (N. S.) 85, per Pollock, B.; Ross v. Parkyns, L. R. 20 Eq. 331; Mollwo, March & Co. v. Court of Wards, L. R. 4 P. C. 435; Pooley v. Driver, 5 Ch. Div. 458; Ex parte Tennant, 6 Ch. Div. 303; Ex parte Delhasse, 7 Ch. Div. 511. Defendant was an attorney at law and agreed to render all the legal services necessary to protect W. in the enjoyment of certain mines, the lease of which defendant was active in procuring, and was to receive therefor part of the net profits. W. had the exclusive management and control of the mines. Held, that the agreement did not make a partnership inter se. Omaha & Grant Smelting & Refining Co. v. Rucker, 6 Colo. App. 334, 40 P. 853. Two persons were held to be partners where they had agreed one to pay the other £9 per annum per mile the distance between two points, this other to carry mail between the points, the two to share the expense of repairing the carts, and to divide the profits; all expenses being by them first paid. Green v. Beesley, 2 Bing. N. C. 108. Here was an agreement concerning the business and community of profits in that business arising very plainly from the agreement. But where one of three persons, joint owners of land, agreed to loan money to the other two for the purchase of ironmongery to be used in the construction of houses on the land contemplated by the latter persons to be built by them to sell again, the loaner to be repaid out of the proceeds of the sale of the houses, and to lose his money pro tanto if the sale did not realize sufficient to pay it all back to him, the loaner was not a partner. Kilshaw v. Jukes, 3 Best & S. 847. Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, is a stronger case. Here, in consideration of loans to be made a firm by an individual the former agreed to pay the latter, in addition to the interest on the sum loaned, one-tenth of the net profits over and above $10,000 on the business for one year. But, in the event of the profits not reaching $10,000, he was to be paid only the interest, and no profits at all. Held no partnership. H. agreed to "loan and advance" to M. and L., under the firm name of N. Bros., $5,000, from time to time, as the business might require; the money to remain a permanent fund not less than one year nor more than five years. In consideration of this, N. Bros. agreed to devote their time and skill to the business, to keep accounts, open to H.'s inspection, and pay him semiannually three-fifths of the profits, guarantying that they should amount to at least $3,000 annually. For security, H. was given a lien on all the firm property. The agreement might be continued by H. for 10 years. N. Bros. were to contract no debts outside the business, and not to draw on the firm property except for necessary support. A violation of the contract was to be "regarded as an end of the loan," and H. might then seize all the firm property to satisfy his advances. Held, that H. was a partner as to third persons. Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378. Where R. owned and was running one steamboat, and D. owned and was

"I take it," said Cotton, L. J., in Ex parte Tennant,[149] "the law is this: That participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists,—that is to say, whether there was a joint business; or, putting it in another way, whether the parties were carrying on the business as principals and agents for each other,—whether it is a joint business or the business of one only." If the whole facts show that the person sought to be charged authorized the carrying on of the business on account and for the benefit of himself, then he is liable as a partner would be, and he can no more avoid responsibility to third persons by showing that he had stipulated with the ostensible partners that he should not be liable for the debts of the firm than could any other concealed principal, by stipulations with his own agent, avoid liability to third parties on contracts effected by that agent on his behalf, within the authority given by him. But it is obvious that it is almost impossible to define accurately what are the states of circumstances which establish the relations in this sense of principal and agent. Capital embarked, powers of interference in the business, profits received, are all circumstances to be taken into consideration in deciding the question.[150]

15. SHARING BOTH PROFITS AND LOSSES—Proof of an agreement to share both profits and losses is sufficient to show a partnership prima facie.

Where the agreement is to own and carry on a business jointly, and to share in the profits and losses because they do own it, the parties are partners, as a matter of law, because they have done the

running another, and it was agreed between them that at the end of the season of navigation, if the earnings of either boat, less running expenses, should exceed those of the other, less running expenses, the excess should be divided between them, held this did not make them partners in running the boats. Fay v. Davidson, 13 Minn. 523 (Gil. 491). Cf. Connolly v. Davidson, 15 Minn. 519 (Gil. 428).

149 6 Ch. Div. 303, 315.

150 Waugh v. Carver, 1 Smith, Lead. Cas. (8th Ed.) 1331.

very thing which the law defines as a partnership. Usually, however, the agreement is not so full and complete, and the intention is not so clearly expressed. In such cases the intention must be ascertained from all the acts and circumstances of the parties, and various tests have been suggested. Thus, it has been said that an agreement to share both the profits and the losses is sufficient to render the parties partners.[151] Lindley says that he is not aware of any case in which persons who have agreed to share profits and losses have been held not to be partners.[152] Cases where the fact

[151] Lindl. Partn. p. 10. And see Scott v. Campbell, 30 Ala. 728. Where two parties purchase and conduct a business under an agreement to share in the profits and losses, they are partners. Martin v. Cropp, 1 Mo. App. Rep'r, 438.

[152] Lindl. Partn. p. 10. Grinton v. Strong, 148 Ill. 587, 36 N. E. 559, is such a case. See, also, Walker v. Hirsch, 27 Ch. Div. 460; Badeley v. Bank, 38 Ch. Div. 238; Marsh v. Insurance Co., 3 Biss. 351, Fed. Cas. No. 9,118; Snell v. De Land, 43 Ill. 323; Monroe v. Greenhoe, 54 Mich. 9, 19 N. W. 569; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26; Osbrey v. Reimer, 51 N. Y. 630; Chapline v. Conant, 3 W. Va. 507. Where money is advanced under a deed to a person engaged, or about to be engaged, in business, the mere fact that it has been agreed that the lender shall participate in the profits and losses is not of itself conclusive of partnership, if it appears from the deed as a whole that it was not the intention of the parties to create a partnership between them. King v. Whichelow, 64 Law J. Q. B. 801. Prof. Ames criticises this statement of Mr. Lindley. In a note to his cases on Partnership (page 124) he says: "But this statement, it is conceived, is much too sweeping. An agreement to share profits and losses creates a strong, but not conclusive, presumption of a partnership between the parties, as appears from the following authorities: Moore v. Davis, 11 Ch. Div. 261 (semble); Stevens v. Faucet, 24 Ill. 483; Chaffraix v. Price, 29 La. Ann. 176; Dwinel v. Stone, 30 Me. 384 (semble); Howe v. Howe, 99 Mass. 71 (semble); Donnell v. Harshe, 67 Mo. 170; Musser v. Brink, 68 Mo. 242 (semble); Osbrey v. Reimer, 49 Barb. 265. * * * But see Scott v. Campbell, 30 Ala. 728; Getchell v. Foster, 106 Mass. 42 (semble), contra. But see Marsh v. Insurance Co., 3 Biss. 351, Fed. Cas. No. 9,118; Fawcett v. Osborn, 32 Ill. 411 (and see Stevens v. Faucet, 24 Ill. 483); Snell v. De Land, 43 Ill. 323 (semble); Chaffraix v. Price, 29 La. Ann. 176; Chaffraix v. Lafitte, 30 La. Ann. 631; Fay v. Davidson, 13 Minn. 523 (Gil. 491) (but see Connolly v. Davidson, 15 Minn. 519 [Gil. 428]); Chapline v. Conant, 3 W. Va. 507,—in all of which cases it was held that A. was not liable as a partner with B. to third persons, although he was to share profits and losses with B.,—contra. In Noakes v. Barlow, 26 Law T. (N. S.) 136, Blackburn, J., said (page 139): 'If the question in this case had depended on the simple question whether sharing in profits and losses constituted a partnership so as to authorize one party to pledge the other's credit, I

of partnership comes into dispute are certainly rare, where the parties have unquestionably so agreed. It is usually in the absence of the admitted fact of an agreement to share losses that the question arises. But an agreement to share the profits and losses of a business certainly does not necessarily make the persons so agreeing joint owners in the profits.[153] It is therefore not conclusive of the fact of partnership, and it may be shown that the profits and losses were to be shared on some other basis, and for some other reason, than because the parties are the joint proprietors of the business.[154] But, in the absence of evidence as to the real basis on which profits and losses were to be shared, it is a fair inference that persons who have so agreed are joint proprietors of the business and profits, or, in other words, are partners.[155]

should have thought the direction right; as, since the decision in Cox v. Hickman [8 H. L. Cas. 268] it has been the law that sharing in profits and losses does not in itself constitute a partnership, but only affords a strong presumption that the one party is made the agent for the other.' See, also, Kilshaw v. Jukes, 3 Best & S. 847."

[153] It requires something more than mere participation in profits and losses to constitute a partnership. Gilpin v. Enderbey, 5 Barn. & Ald. 954; Bucknam v. Barnum, 15 Conn. 67; Rankin v. Fairley, 29 Mo. App. 587; Newberger v. Friede, 23 Mo. App. 631; Kelly v. Gaines, 24 Mo. App. 506; Butler v. Merrick, 24 Ill. App. 628. Such participation must be because the parties stand in the relation of principal proprietors of the business. Flower v. Barnekoff, 20 Or. 137, 25 Pac. 370; Spaulding v. Stubbings, 86 Wis. 255, 56 N. W. 469; Boston & C. Smelting Co. v. Smith, 13 R. I. 27; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26; Somerby v. Buntin, 118 Mass. 279; Duryea v. Whitcomb, 31 Vt. 395; Morse v. Richmond, 97 Ill. 303. "Where it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear, and actual partnership exists between the parties." Flower v. Barnekoff, 20 Or. 132, 144, 25 Pac. 370, 374; citing Berthold v. Goldsmith, 24 How. 536. "If A. agree with B. to share profits and losses, but not to interfere with the business, and not to buy nor sell, and does not interfere nor buy nor sell, and C., knowing this, deals with B., he would have no claim on A. Why should he, if he does not know of it?" Per Bramwell, B., in Bullen v. Sharp, L. R. 1 C. P. 86, 125.

[154] Bates, Partn. § 29. See Kilshaw v. Jukes, 3 Best & S. 847; Bullen v. Sharp, L. R. 1 C. P. 86; Ex parte Delhasse, 7 Ch. Div. 511; Smith v. Wright, 5 Sandf. 113. Subpartnerships are a class of cases in which there is a sharing of profits and losses, but no partnership. See post, p. 79.

[155] "If one person is to furnish the property or the money with which to procure it, and the other is to give his services in disposing of it under an agree-

16. SHARING PROFITS ONLY—Partnership is prima facie the result of an agreement to share profits, although nothing may be said about losses, and although there may be no common stock.

17. Partnership is prima facie the result of an agreement to share profits, although community of loss is stipulated against.

Where an agreement between two or more persons merely provides that a business shall thereafter be conducted by one or more of them, and the profits divided between them all, although nothing is said about losses, the most natural inference is that all the parties are to be joint owners of the profits. Accordingly, a partnership is the prima facie result of such an agreement.[156] If the

ment by which they are to divide profit and loss, it is a partnership inter se, for a sharing of loss is generally inconsistent with a mere employment." Bates, Partn. § 28, citing, inter alia, Pawsey v. Armstrong, 18 Ch. Div. 698; Clark v. Gridley, 49 Cal. 105; Sprout v. Crowley, 30 Wis. 187. But see Newberger v. Friede, 23 Mo. App. 631. In Duryea v. Whitcomb, 31 Vt. 395, there was an agreement to share both profits and losses. The court said: "As the contract imports a partnership, we must hold, in the absence of any express stipulation, and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses." See, also, Morse v. Richmond, 97 Ill. 303; Pierce v. Shippee, 90 Ill. 371; Marsh v. Russell, 66 N. Y. 288; Meaher v. Cox, 37 Ala. 201; Stevens v. Faucet, 24 Ill. 483; Osbrey v. Reimer, 51 N. Y. 630; Edwards v. Tracy, 62 Pa. St. 374; McDonald v. Matney, 82 Mo. 358; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26; Dwinel v. Stone, 30 Me. 384; Bullen v. Sharp, L. R. 1 C. P. 86; Ex parte Delhasse, 7 Ch. Div. 511, 521; Green v. Beasley, 2 Bing. N. C. 108.

[156] Lindl. Partn. p. 12. An agreement between two persons to share the profits of a business is, inter se, prima facie proof only that they are partners. Kootz v. Tuvian (N. C.) 24 S. E. 776. "I think it may be taken as established by the authorities that, in the absence of something in the contract to show a contrary intention, the right to share profits as profits constitutes, according to English law, a partnership. I cannot find, as far as I can see, a single authority which conflicts with that proposition." Pooley v. Driver, 5 Ch. Div. 458, 470. A contract under which two persons are to share the profits of a business, but which fails to provide for a sharing of the losses, does not constitute a partnership inter se. Winter v. Pipher (Iowa) 64 N. W. 663. To constitute a partnership there must be an agreement to share not only in the profits of a joint venture, but in

contract further provide that losses shall likewise be shared by all, the inference that a partnership was intended is strengthened, because, as will be seen, liability for losses is one of the incidents of a partnership.[157] But, even where nothing is said as to losses, the presumption that a partnership was intended remains, in the absence of anything to show that the profits were to be shared on some other basis than that of joint ownership.[158] In other words,

the losses as well. McBride v. Ricketts (Iowa) 67 N. W. 410. These last cases go too far. Mayrant v. Marston, 67 Ala. 453. It is not necessary, in order to constitute a partnership, that there be an express agreement that each party shall bear a share of any losses which may occur in the business. This may be inferred from the other provisions of the contract, and the nature of the business, and the relation of parties to the business to be transacted. Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668. Except in cases specially provided for by statute, an agreement to share profits, nothing being said about losses, amounts prima facie to an agreement to share losses also. It follows from this that, where no statute interferes, an agreement to share profits is prima facie an agreement for a partnership. Illingworth v. Parker, 62 Ill. App. 650. An agreement, indefinite as to its continuance, which provides for the selling on commission, or the purchase and sale at a profit, of several tracts of land, the deduction from the net profits, whether money or land, of the expenses incurred, and a division of these profits equally between the parties, each of whom is to use his time and skill to effect the sale or sales, renders such parties partners, though no agreement was made as to sharing the losses; and either is entitled to an account in equity to ascertain the result of the enterprise. Jones v. Murphy (Va.) 24 S. E. 825.

157 See post, p. 235.

158 Heyhoe v. Burge, 9 C. B. 440; Dry v. Boswell, 1 Camp. 330; Chester v. Dickerson, 54 N. Y. 1; Manhattan Brass & Manuf'g Co. v. Sears, 45 N. Y. 797; Sheridan v. Medara, 10 N. J. Eq. 469; Harvey v. Childs, 28 Ohio St. 319; Lengle v. Smith, 48 Mo. 276. "The rule is well settled that whenever a person becomes entitled to an actual participation in the profits of the joint business as profits, so as to entitle him to an account, and give him a specific lien on the partnership assets for payment of his share of the profits, in preference to the creditors of the individual partners, he becomes a partner as to creditors of the firm, although it may be expressly agreed between them that he shall not be so considered. The members of a firm cannot enjoy all the benefits of a partnership, and, by secret agreement among them that they shall not be so considered, exempt themselves from the liabilities that flow from the relation. But, if the profits are taken in the character of an agent or servant as a mere compensation for services, and the party is so held out to the world, he is not, even as to creditors, held to be a partner." Voorhees v. Jones, 29 N. J. Law, 270. For other cases of joint ownership, see Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Tyler v. Scott, 45 Vt. 261; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Sankey v. Columbus Iron Works,

the sharing of profits is merely a prima facie, and not a conclusive, test of partnership. The parties may show that the profits were to be shared in some other right.[159] The intention of the parties, as gathered from the whole contract and the surrounding circumstances, controls.[160] Thus, where a father paid a sum of money as his in-

44 Ga. 228; Hill v. Sheibley, 68 Ga. 556; Staples v. Sprague, 75 Me. 458; Doak v. Swann, 8 Me. 170. For cases where there was no joint ownership, see Morrison v. Cole, 30 Mich. 102; Dwinel v. Stone, 30 Me. 384; Bull v. Schuberth, 2 Md. 38; Flint v. Marble Co., 53 Vt. 669; Parker v. Fergus, 43 Ill. 437; McArthur v. Ladd, 5 Ohio, 514; Cassidy v. Hall, 97 N. Y. 159; Prouty v. Swift, 51 N. Y. 594; Ashby v. Shaw, 82 Mo. 76; Ford v. Smith, 27 Wis. 261.

159 "The way in which the profits are to be shared is the essence of the matter, and when the right to profits arises by virtue of an express contract, and does not flow from the relations of the parties, the right exists qua debt, and not by virtue of a partnership." Lindl. Partn. (Wentw. Ed.) p. 13, note 2. See, also, Loomis v. Marshall, 12 Conn. 69; Brown v. Jaquette, 94 Pa. St. 113; Pleasants v. Fant, 22 Wall. 116. The receipt of a share of profits in a business is, under section 2, subsec. 3, Partnership Act 1890, prima facie evidence of a partnership. This may, however, be rebutted by a consideration of the whole of the circumstances of each case. Badeley v. Bank, 38 Ch. Div. 238, considered. Davis v. Davis, 8 Reports, 133; Id. [1894] 1 Ch. 393. The interest of each in the profits must be as a principal in the joint business with a community of interest in the profits as such. Where one purchased one-fourth of the profits of a partnership, to be ascertained, that did not make him a partner. Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588.

160 The coincidence of a joint capital and a sharing of the profits raises a strong presumption that the parties intended a community of interest in the profits, and therefore that a partnership exists. In the absence of anything to show a contrary intention, this presumption would be conclusive. Bates, Partn. § 31. Most cases of true partnerships fall under this class. See Ward v. Thompson, 22 How. 330; Doak v. Swann, 8 Me. 170; Barrett v. Swann, 17 Me. 180; Staples v. Sprague, 75 Me. 458; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Griffith v. Buffum, 22 Vt. 181. See cases cited to illustrate development of modern doctrine, ante, p. 34 et seq. Where one partner furnishes all the capital, and the other services, the parties will be held partners, unless a contrary intention be made to appear. Pooley v. Driver, 5 Ch. Div. 458; Robbins v. Laswell, 27 Ill. 365; Ruckman v. Decker, 23 N. J. Eq. 283; Ryder v. Wilcox, 103 Mass. 24; Wright v. Davidson, 13 Minn. 449 (Gil. 415); Lengle v. Smith, 48 Mo. 276. Where an intention not to be co-owners is shown, and the profits are shared for some other reason, there is no partnership. See cases cited ante, note 134, and "Profits Shared as Compensation," post, note 162. Also Stevens v. Faucet, 24 Ill. 483. "This rule is, however, imperfect, since the difficulty sometimes arises to determine whether the business is owned by both, and since joint ownership may

fant son's share of the capital of the partnership, and it was agreed that during the son's minority the profits should be accounted for to the father, it was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement.[161] Other illustrations of the same principle are afforded by those cases in which managers, clerks, agents, etc., are paid salaries proportionate to the profits of the business in which they are employed. No partnership subsists between persons thus paid, and those who pay them, where it appears from the whole agreement that a partnership was not intended, or, in other words, where the profits were not shared because of community of ownership in them.[162] If, however, a servant sharing profits has also an interest in the partnership, capital, or stock, this additional circumstance goes far to show that a partnership was, in fact, intended.[163]

be inferred as a consequence quite as well as a cause of sharing profits as partners." Bates, Partn. § 35. In the case of an alleged lending, any power of control vested in the lender may turn the scale in favor of a partnership. See Mollwo v. Court of Wards, L. R. 4 P. C. 419; Pooley v. Driver, 5 Ch. Div. 458; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398; Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Richardson v. Hughitt, 76 N. Y. 55; Leggett v. Hyde, 58 N. Y. 272; Waverly Nat. Bank v. Hall, 150 Pa. St. 466, 24 Atl. 665. Generally, as to effect of right of control, see Clark v. Smith, 52 Vt. 529; Braley v. Goddard, 49 Me. 115; Dwinel v. Stone, 30 Me. 384; Voorhees v. Jones, 29 N. J. Law, 270; Ashby v. Shaw, 82 Mo. 76; Conklin v. Barton, 43 Barb. (N. Y.) 435; Hunt v. Erikson, 57 Mich. 330, 23 N. W. 832. Cf. Meador v. Hughes, 14 Bush (Ky.) 652.

161 Barklie v. Scott, 1 Huds. & B. 83.

162 Ex parte Tennant, 6 Ch. Div. 303; Ross v. Parkyns, L. R. 20 Eq. 331; Rawlinson v. Clarke, 15 Mees. & W. 292; Burton v. Goodspeed, 69 Ill. 237; Smith v. Bodine, 74 N. Y. 30; Burckle v. Eckart, 1 Denio (N. Y.) 338; Vinson v. Beveridge, 3 McArthur, 597; Coffin v. Jenkins, 3 Story, 108, Fed. Cas. No. 2,948; Meserve v. Andrews, 104 Mass. 360; Morrison v. Cole, 30 Mich. 102; Hall v. Edson, 40 Mich. 651; Hamper's Appeal, 51 Mich. 71, 16 N. W. 236; Morgan v. Farrel, 58 Conn. 414, 20 Atl. 614; Pond v. Cummins, 50 Conn. 372; Hitchings v. Ellis, 12 Gray (Mass.) 449; Ruddick v. Otis, 33 Iowa, 402; Perry v. Smith, 29 N. J. Law, 74; Nutting v. Colt, 7 N. J. Eq. 539; Shepard v. Pratt, 16 Kan. 209; Sodiker v. Applegate, 24 W. Va. 411; Whitehill v. Shickle, 43 Mo. 538; Dale v. Pierce, 85 Pa. St. 474; Waverly Nat. Bank v. Hall, 150 Pa. St. 466, 24 Atl. 665; Boston & C. Smelting Co. v. Smith, 13 R. I. 27; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588.

163 See Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Magovern v. Robert-

Partnerships in Profits Only.

It is not, however, essential to the existence of a partnership, that there shall be any joint capital or stock.[164] If several persons labor together for the sake of gain, and of dividing that gain, they will not be partners the less on account of their laboring with their own tools.[165] Thus, in Fromont v. Coupland,[166] two persons who horsed a coach, and divided the profits, were held to be partners, although each found his own horses, and the other had no property in them. So, in French v. Styring,[167] where two co-owners of a race horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the court had no hesitation in admitting that they might have been partners in the profits, although not in the horse itself. Again, it frequently happens that one person has property, and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided. In such cases it may be difficult to say whether a partnership is or is not created.[168] In Stocker v. Brockelbank,[169] it is clear that no partnership was intended, and none was created. In the case of Greenham v. Gray,[170] it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly, although the mills and machinery and buildings by means of which the business was carried on clearly belonged to one partner only.

Stipulations against Community of Loss.

The inference that, where there is community of profit, there is a partnership, is so strong that, even if community of loss be ex-

son, 116 N. Y. 61, 22 N. E. 298; Spaulding v. Stubbings, 86 Wis. 255, 56 N. W. 469; Sawyer v. Bank, 114 N. C. 13, 18 S. E. 949.

164 As instances of partnerships in profits only, see Stevens v. Faucet, 24 Ill. 483; Robbins v. Laswell, 27 Ill. 365.

165 Lindl. Partn. p. 14.

166 2 Bing. 170. See, also, Lovegrove v. Nelson, 3 Mylne & K. 1.

167 2 C. B. (N. S.) 357.

168 See cases cited supra, note 162, "Profits Shared as Compensation." See, also, Reynolds v. Pool, 84 N. C. 37; Holt v. Kernodle, 1 Ired. (N. C.) 199; Beauregard v. Case, 91 U. S. 134; Stroher v. Elting, 97 N. Y. 102.

169 3 Macn. & G. 250.

170 4 Ir. C. L. 501.

pressly stipulated against, partnership may, nevertheless, subsist. Persons who have so agreed are prima facie partners.[171] In Coope v. Eyre,[172] Lord Loughborough is reported to have said: "In order to constitute a partnership, communion of profits and loss is essential." But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity.[173] Third persons are not concerned with such an agreement, and, as to them, the parties being really partners inter se, are all primarily liable.[174]

18. SHARING GROSS RETURNS—Partnership is not the result of an agreement to share gross returns.

It is well established that an agreement to share gross returns does not create a partnership.[175] It has just been seen that prima

171 Lindl. Partn. p. 15. An agreement whereby one party is to furnish the capital necessary to carry on the business, is to share equally in the profits, and, in case of loss, is guarantied the return of his investment, does not constitute the parties partners, hence the rule of interest on overdrafts under partnership agreements does not apply. Orvis v. Curtiss, 12 Misc. Rep. 434, 33 N. Y. Supp. 589. For cases involving agreements against losses, see Bond v. Pittard, 3 Mees. & W. 357; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Gilpin v. Enderbey, 5 Barn. & Ald. 954; Brown v. Tapscott, 6 Mees. & W. 119. See, also, Priest v. Chouteau, 85 Mo. 398; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Berthold v. Goldsmith, 24 How. 536; Pollard v. Stanton, 7 Ala. 761; McKasy v. Huber (Minn.) 67 N. W. 650.

172 1 H. Bl. 48.

173 Bond v. Pittard, 3 Mees. & W. 357; Geddes v. Wallace, 2 Bligh, 270.

174 Everitt v. Chapman, 6 Conn. 347.

175 "The sharing of gross returns with or without a common interest in property from which the returns come does not of itself create any partnership." Pol. Partn. p. 5; illustrating the principle by Lyon v. Knowles, 3 Best & S. 556. Such an agreement did not create a partnership as to third persons, even as the law stood prior to Cox v. Hickman, when it was held that a mere agreement to share profits created a partnership as to third persons. The sharing of "gross profits" has never been regarded as any evidence of partnership. Wilkinson v. Frasier, 4 Esp. 182; Dry v. Boswell, 1 Camp. 329; Chapman v. Eames, 67 Me. 452; Bowman v. Bailey, 10 Vt. 170; Loomis v. Marshall, 12 Conn. 69; Cutler v. Winsor, 6 Pick. (Mass.) 335; Turner v. Bissell, 14 Pick. (Mass.) 192; Merrick v. Gordon, 20 N. Y. 93; Butterfield v. Lathrop, 71 Pa. St. 225; Champion v. Bost-

facie an agreement to share profits does result in a partnership. It is obvious that an important distinction exists between the terms "profits" and "gross returns." Profits are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. The expressions "net profits" and "gross profits" are met with in the books, but they are inaccurate. "Profits" and "net profits" are, for all legal purposes, synonymous expressions. All profits are necessarily net, and no profits can possibly be gross. But the term "gross profits" is sometimes used to designate the returns. This use of the term, however, is inaccurate. A business is susceptible of "gross returns" and "net returns," and "profits" is the synonym of "net returns." The distinction between profits, on the one hand, and gross returns, on the other, is obvious.

An agreement to share gross returns does not create a partnership, for the reason that such an agreement is inconsistent with the joint ownership of the profits. In a partnership the profits are shared because the partners are joint owners of them. If no profits have been made, no partner is entitled to any share as against the others, for there is nothing to share. But, where the agreement is to share gross returns, the share is independent of the existence of profits, and may be taken when there is a loss. It necessarily follows that an agreement to share gross returns creates a debt between the parties, and not a joint proprietorship in the profits. "Though the

wick, 18 Wend. (N. Y.) 175; Putnam v. Wise, 1 Hill (N. Y.) 234; Irvin v. Railway Co., 92 Ill. 103; Goell v. Morse, 126 Mass. 480; La Mont v. Fullam, 133 Mass. 583; Cutler v. Winsor, 6 Pick. (Mass.) 335; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; Eastman v. Clark, 53 N. H. 276; Quackenbush v. Sawyer, 54 Cal. 439; Miles Co. v. Gordon, 8 Wash. 442, 36 Pac. 265; Day v. Stevens, 88 N. C. 83; Reynolds v. Pool, 84 N. C. 37; Pulliam v. Schimpf, 100 Ala. 362, 14 South. 488; Nelms v. McGraw, 93 Ala. 245, 9 South. 719; Hagenbeck v. Arena Co., 59 Fed. 14. Where two parties agree that one shall furnish a farm and a certain amount of teams and labor, and the other to give labor and manage the farm, and the crop to be divided between them, such an agreement does not constitute a partnership. Blue v. Leathers, 15 Ill. 31. See, also, Hurley v. Walton, 63 Ill. 260; Sargent v. Downey, 45 Wis. 498; Gilman v. Cunningham, 42 Me. 98; Carter v. Bailey, 64 Me. 458; Austin v. Thomson, 45 N. H. 113; Donnell v. Harshe, 67 Mo. 170; Smith v. Summerlin, 48 Ga. 425.

sum may come out of profits, if they are sufficient, it will, nevertheless, come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's. A proprietor's share springs out of the business, and varies according to its vicissitudes. A principal who made no contribution himself could never take his co-partner's, and make gain out of his co-partner's loss and the failure of the business." [176]

Illustrations.

A sailor shipping for a whaling voyage under an agreement to receive a share of the oil for his services takes it as a servant, and not as a partner.[177] Connecting carriers are not partners, though a through rate is charged, where each bears the expense of its own portion of the line, and the gross receipts are shared in an agreed proportion.[178] But, if there is any expense to be paid out of the

[176] J. Pars. Partn. § 62. This is the only intelligible explanation of the rule to be found in the books.

[177] Wilkinson v. Frasier, 4 Esp. 182. And see Mair v. Glennie, 4 Maule & S. 240; Moore v. Curry, 106 Mass. 409; Coffin v. Jenkins, 3 Story, 108, Fed. Cas.

[178] In Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573, Rothrock, C. J., quotes with approval the rule laid down in Hutch. Carr. (2d Ed.) § 169, which is: "That where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither inter se nor as to third persons, and incur no joint liability." See, also, Carter v. Peck, 4 Sneed (Tenn.) 203; Hart v. Railroad Co., 8 N. Y. 37; Cincinnati, H. & D. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Block v. Railroad Co., 139 Mass. 308, 1 N. E. 348; Hill Manuf'g Co. v. Boston & L. R. Corp., 104 Mass. 122; Wyman v. Railroad Co., 4 Mo. App. 35. But see Smith v. Railroad Co., 58 Mo. App. 80. Where the owners of stage lines each provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate sections of the route, except the tolls at turnpike gates, and the moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the number of miles of the route run by each, they were held liable as partners. Bostwick v. Champion, 11 Wend. 571, affirmed 18 Wend. 175. But the fact that the connecting carriers transact their true business by means of a joint committee or a common agent will not make them liable as such. Straiton v. Railroad Co., 2 E. D.

receipts before division, they are partners.[179] Where the proprietor of a theater lets it to a manager, who finds the acting company, on the terms of the proprietor providing for the general service and expenses of the theater, and the gross receipts being equally divided, the proprietor's share of receipts is merely a substitute for rent, and his taking it does not make him in any sense a partner with the manager.[180] A landowner and one who cultivates the land for a share of the crop are not partners.[181] A broker paid by a commission on goods sold is an agent, not a partner.[182] Brokers who have agreed to divide commissions are not partners.[183] "The fact that

Smith (N. Y.) 184; Ellsworth v. Tartt, 26 Ala. 733; Watkins v. Railroad Co., 8 Mo. App. 569. An agreement to share pro rata losses that cannot be located does not make the connecting carriers partners. Aigen v. Railroad Co., 132 Mass. 423; Irvin v. Railway Co., 92 Ill. 103. An arrangement between a dispatch company of St. Louis, Mo., and sundry railroad companies whose lines terminated at New York, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract, does not involve joint liability upon the part of the railroad companies, nor make them partners either inter sese or as to third persons. Insurance Co. v. Railroad Co., 104 U. S. 146.

[179] Ellsworth v. Tartt, 26 Ala. 733; Montgomery & W. P. R. Co. v. Moore, 51 Ala. 394; Insurance Co. v. Railroad Co., 104 U. S. 146; Briggs v. Vanderbilt, 19 Barb. 222; Gass v. Railroad Co., 99 Mass. 220; Converse v. Transportation Co., 33 Conn. 166. Where several persons were engaged in running a line of stages, and, by the agreement between them, one was to run at his own expense a certain portion of the route, and the others, in like manner, the residue, each being authorized to receive fare from passengers over the whole or any part of the route, and the fare so received to be divided between them in proportion to the distance which they respectively transported such passengers, held, that this did not constitute a partnership between the parties. Pattison v. Blanchard, 5 N. Y. 186. See Hale, Bailm. & Carr. pp. 473–475.

[180] Lyon v. Knowles, 3 Best & S. 556.

[181] Blue v. Leathers, 15 Ill. 31; M'Laurin v. M'Coll, 3 Strob. (S. C.) 21; Frout v. Hardin, 56 Ind. 165; Mann v. Taylor, 5 Heisk. (Tenn.) 267; Tayloe v. Bush, 75 Ala. 432; Gurr v. Martin, 73 Ga. 528; Day v. Stevens, 88 N. C. 83; Donnell v. Harshe, 67 Mo. 170; Musser v. Brink, 68 Mo. 242, 80 Mo. 350; Brown v. Jaquette, 94 Pa. St. 113; Moore v. Smith, 19 Ala. 774. But see Allen v. Davis, 13 Ark. 28; Adams v. Carter, 53 Ga. 160; Holifield v. White, 52 Ga. 567. Cf. Plummer v. Trost, 81 Mo. 425; Urquhart v. Powell, 54 Ga. 29; Brown's Ex'r v. Higginbotham, 5 Leigh (Va.) 583.

[182] Dillard v. Scruggs, 36 Ala. 670. Bates, Partn. §§ 60, 43.

[183] Wass v. Atwater, 33 Minn. 83, 22 N. W. 8; Pomeroy v. Sigerson, 22 Mo. 177. But see Thwing v. Clifford, 136 Mass. 482.

the recipient of part of the gross receipts is to furnish part of the expenses or tools or material, as well as labor, does not alter the result. Thus, in cultivating land, where an overseer or cultivator is to furnish part of the teams or pay part of the labor, and the crop is to be divided, it is not a partnership, but is a leasing or an employment or a tenancy in common of the crop, according to the nature of the enterprise." [184] Co-owners of a chattel who agree to divide its gross earnings are not partners.[185] French v. Styring [186] is a leading case on this point. There the plaintiff and defendant were entitled in common to a race horse. It was agreed that the plaintiff should keep, train, and have the management of the horse; that 35 shillings a week should be allowed for the expenses of his keep; that the plaintiff should pay the expenses of entering the horse, and conveying him to the different races; and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and private funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided among them equally.

SAME—CONTEMPLATED PARTNERSHIPS.

19. Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues.

184 Bates, Partn. § 61. A lease of a farm, by which the landlord furnished the stock on the farm and one-half the seed grain, the profits to be equally divided, does not constitute a partnership, but the parties are co-tenants in the products. Williams v. Rogers (Mich.) 68 N. W. 240. An agreement between two parties to farm on shares, one of whom is to expend a certain sum in the farming operations, does not constitute a partnership, though one of the parties spoke of it as such. Rose v. Buscher, 80 Md. 225, 30 Atl. 637. See, also, Cherry v. Strong, 96 Ga. 183, 22 S. E. 707; Freeman v. Gordon, 59 Ill. App. 189.

185 Quackenbush v. Sawyer, 54 Cal. 439. "A mere joint ownership does not make a partnership, nor does dividing an income." Bates, Partn. § 63.

186 2 C. B. (N. S.) 357.

It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon.[187] It is not always easy to determine whether an agreement amounts to a contract of partnership, or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues; for, if there is, the parties will not be partners until such time has elapsed or act has been performed.[188]

187 Dickinson v. Valpy, 10 Barn. & C. 128. Until an agreement of partnership has been executed at least so far as to entitle one to a participation in profits, he cannot maintain a suit for the appointment of a receiver and a dissolution. Hobart v. Ballard, 31 Iowa, 521. On the subject of incomplete partnership, see Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Wilson v. Campbell, 10 Ill. 383; Baldwin v. Burrows, 47 N. Y. 199; Reboul v. Chalker, 27 Conn. 114; Snodgrass v. Reynolds, 79 Ala. 452. A mere agreement to constitute a partnership in futuro does not make the contracting parties liable as partners. In Atkins v. Hunt, 14 N. H. 205, the defendant signed articles of association in trade under the name of the Farmers' & Mechanics' Store, by which it was provided that any stockholder might withdraw upon giving six months' notice, and that the business of the company should be done pursuant to a major vote of those present. A by-law provided that each subscriber should become a partner. Defendants subscribed a certain sum. It was held that this was not simply an agreement that a partnership should be formed at some future day, but an actual existing partnership between the subscribers, both inter se and as to third persons. See, also, Goddard v. Pratt, 16 Pick. (Mass.) 412.

188 Lindl. Partn. p. 20. See Davis v. Evans, 39 Vt. 182; London Assur. Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442; Sailors v. Printing Co., 20 Ill. App. 509. Where the contract makes certain acts conditions precedent, no partnership exists until such acts are performed. See James v. Stratton, 32 Ill. 202; Stevenson v. Mathers, 67 Ill. 125; Hobart v. Ballard, 31 Iowa, 521. All conditions precedent are waived by actually launching the partnership. Ontario Salt Co. v. Merchants' Salt Co., 18 Grant, Ch. 551; McStea v. Matthews, 50 N. Y. 166; Hubbard v. Matthews, 54 N. Y. 43; Hartman v. Woehr, 18 N. J. Eq. 383. A partner may, at the expiration of the term for which the partnership was formed, maintain an action against the other partners, although he paid into the firm only a part of the money which by the contract forming the partnership he agreed to pay in. Palmer v. Tyler, 15 Minn. 106 (Gil. 81). Option to become a partner,

"A marked distinction exists in law between an agreement to enter into the co-partnership relation at a future day and a co-partnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a co-partnership at a future day, unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory, the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is, undoubtedly, true that a partnership in præsenti may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance, or an action at law for the recovery of damages, should any be sustained." [189]

see Lindl. Partn. p. 20; Ex parte Davis, 4 De Gex, J. & S. 523; Gabriel v. Evill, 9 Mees. & W. 297; Ex parte Turquand, 2 Montagu, D. & D. 339; In re Hall, 15 Ir. Ch. 287; Irwin v. Bidwell, 72 Pa. St. 244; Williams v. Soutter, 7 Iowa, 435. Option not to be a partner, see Bidwell v. Madison, 10 Minn. 13 (Gil. 1). When a contract between parties contemplates action to be taken at once and continuously for the joint benefit, one party to furnish the money in advance and the other to give his time and attention to putting up machinery to carry on the proposed enterprise, a present partnership is created, and not merely an agreement to form a future partnership entered into. The purpose must be derived from the nature of the agreement, and not from the meaning of the words as present or future standing alone. Kerrick v. Stevens, 55 Mich. 167, 20 N. W. 888.

[189] Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 685. Where there is an agreement to be partners after a fixed time, the mere arrival of such time does not necessarily make the parties partners. Non constat one of them may repudiate the agreement, and elect to respond in damages for breach of contract. The partnership must be launched. See Doyle v. Bailey, 75 Ill. 418; Wilson v. Campbell, 10 Ill. 383; Powell v. Maguire, 43 Cal. 11; Vance v. Blair, 18 Ohio, 532; Gray v. Gibson, 6 Mich. 300; Brink v. Insurance Co., 5 Rob. (N. Y.) 104. See, also, Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 30 S. W. 163; Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201.

Partnership Articles to be Drawn Up.

Persons who agree to become partners may be partners, although they contemplate signing a formal partnership deed, and never sign it.[190] But if they are not to be partners until they sign formal articles of partnership, and if they do not so act as to waive the performance of such condition, they will not be partners until it has been performed. Beginning business before performance of conditions is evidence of a waiver.[191] Where, however, two persons agreed to become partners from a subsequent day, upon certain terms to be embodied in a deed to be executed on that day, it was held that the partnership began on the day mentioned, although the deed was not executed until afterwards, and although alterations were made in it immediately before its execution.[192] In this case, however, the parties did, in fact, commence business as partners on the day named, and it was wholly immaterial (as regarded the question before the court) what the terms of the partnership were.

SAME—PROMOTERS OF CORPORATIONS.

20. Promoters of corporations are not partners.

Promoters of corporations are not partners because they have not agreed to do those things which in law constitute a partnership. The

[190] Syers v. Syers, 1 App. Cas. 174. The commencement, as to third persons, of a partnership at a time prior to the date of the partnership articles, may be shown by the acts, declarations, and dealings of such persons, as partners, prior to that date, which have induced such third persons to deal with them as partners. Cain Lumber Co. v. Standard Dry-Kiln Co. (Ala.) 18 South. 882.

[191] See Cook v. Carpenter, 34 Vt. 121; Davis v. Evans, 39 Vt. 182; Atkins v. Hunt, 14 N. H. 205; Hartman v. Woehr, 18 N. J. Eq. 383; Morrill v. Spurr, 143 Mass. 257, 9 N. E. 580; National Bank of Chemung v. Ingraham, 58 Barb. (N. Y.) 290; First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831. Defendant and plaintiff agreed orally to form a partnership to carry on an hotel purchased by defendant. In contemplation of the fulfillment of this agreement, they began business, made contracts, opened the books, and performed various other acts in the partnership name. When the articles of partnership were drawn up, they could not agree upon the terms, and defendant finally declined to enter into the partnership. Held, that there was nothing to indicate that the partnership was actually formed, entitling plaintiff to an accounting. Martin v. Baird, 175 Pa. St. 540, 34 Atl. 809.

[192] Battley v. Lewis, 1 Man. & G. 155. And see Wilson v. Lewis, 2 Man. & G. 197. Cf. Ellis v. Ward, 21 Wkly. Rep. 100.

immediate object of their agreement is the formation of a corporation, not the carrying on of a joint business for profit. The parties have agreed to enter into a certain relation at some time in the future after certain conditions have been complied with. This relation is not one of partnership, but of stockholders in a corporation; but, even if a future partnership was intended, it is clear, as has been seen, that no partnership exists in the meantime.[193] Persons associated for the purpose of forming a joint-stock company are not partners. They, clearly, are not partners in the company to be formed, and they cannot be considered as members of a partnership formed to start the company.[194]

In Lucas v. Beach [195] it was asked in argument: "What is there to prevent a number of individuals from entering into a partnership with a limited object, in the first instance, of procuring an act of parliament, and with an ulterior object in view when the act is passed? The auswer is that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract; to confound an agreement with its result; and to hold persons to be partners, although they have not yet acquired any right to share profits." [196]

SAME—DEFECTIVE CORPORATIONS.

21. Persons doing business as a corporation, in good faith believing themselves to be stockholders in a valid corporation, are not liable as partners, although the incorporation is in fact invalid.

"If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such associa-

193 Reynell v. Lewis, 15 Mees. & W. 517; Wyld v. Hopkins, Id.; Ex parte Capper, 1 Sim. (N. S.) 178; Tanner's Case, 5 De Gex & S. 182; Bright v. Hutton, 3 H. L. Cas. 368; Hamilton v. Smith, 5 Jur. (N. S.) 32; West Point Foundry Ass'n v. Brown, 3 Edw. Ch. (N. Y.) 284; Bates, Partn. § 89. Lindley says (page 24) that Holmes v. Higgins, 1 Barn. & C. 74, and Lucas v. Beach, 1 Man. & G. 417, cannot be relied on as authorities contra.

194 Lindl. Partn. p. 24. 195 1 Man. & G. 417. 196 Lindl. Partn. p. 24.

tion cannot be charged as parties to the contract, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or prohibited by law and illegal. The fact that the parties have failed to make a binding contract, as contemplated, because they erroneously supposed that the association was a corporation, or because the agreement actually entered into was prohibited by law, and invalid, would certainly not be a reason for treating them as if they had entered into a different agreement which neither of the parties contemplated. If an association undertakes to enter into a contract as a corporation, it is clear that the members of the association do not agree to be parties to the contract severally or jointly. They do not agree to be bound as partners either to each other or to the party contracting with the association. It is equally clear that the party contracting with the association does not intend to contract with its members individually. To treat the individual members of the association as parties to the contract, under these circumstances, would therefore involve, not only the nullification of the contract which was actually contemplated by the parties, but the creation of a different contract, which neither of the parties intended to make." [197] This view of the law

[197] Mor. Priv. Corp. § 780. Bates says, "The authority against this is, however, very formidable, and is based on general public policy, rather than on any principle of partnership law." Bates, Partn. § 4. In support of the text, see Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; State v. How, 1 Mich. 512 (cf. Whipple v. Parker, 29 Mich. 369); Central City Sav. Bank v. Walker, 66 N. Y. 424; Fuller v. Rowe, 57 N. Y. 23 (but see National Union Bank v. Landon, 45 N. Y. 410); Fay v. Noble, 7 Cush. (Mass.) 188; Trowbridge v. Scudder, 11 Cush. (Mass.) 83 (see Hawes v. Petroleum Co., 101 Mass. 385, 111 Mass. 200; Burnap v. Engine Co., 127 Mass. 586); First Nat. Bank v. Almy, 117 Mass. 476; Harrod v. Hamer, 32 Wis. 162; Second Nat. Bank v. Hall, 35 Ohio St. 158; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Stafford Nat. Bank v. Palmer, 47 Conn. 443. Those who act as agents for an inchoate corporation act without a principal behind them, because there is no body corporate capable of appointing agents, and so become principals in the transaction. Their mistake, though shared by the other subscribers to the stock, does not make such subscribers partners in the business done. Ward v. Brigham, 127 Mass. 24. See, also, Trowbridge v. Scudder, 11 Cush. (Mass.) 83; First Nat. Bank v. Almy, 117 Mass. 476; Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150; Clark. Corp. § 45.

is supported by the weight of authority, though there is ample and weighty authority to the effect that under such circumstances the stockholders are liable as partners.[198] Where, however, the parties act with full knowledge that they do not constitute a corporation, they will be partners, because it is clear that they intended to conduct a business, and jointly own the profits.[199]

In all cases liability will attach to the officers and stockholders who actually engage in the transaction, and to those who authorize or sanction it. This is upon the familiar principle of law that a person who acts as agent without authority or without a principal is himself regarded as a principal, and has all the rights, and is subject to all the liabilities, of a principal.[200]

Where an existing partnership attempts to become incorporated, but fails to effect a valid organization, it remains a partnership.[201] The same rule applies where the firm, having become incorporated, continues to transact business in the partnership name;[202] as is also the case where the members of a corporation knowingly continue their business after the expiration of their charter.[203]

198 To the effect that, if the corporate organization is defective, the members are liable as partners, see Bigelow v. Gregory, 73 Ill. 197. See, also, Coleman v. Coleman, 78 Ind. 344; Holbrook v. Insurance Co., 25 Minn. 229; Hurt v. Salisbury, 55 Mo. 310; Lindl. Partn. (Wentw. Ed.) 5; Jessup v. Carnegie, 80 N. Y. 441; National Union Bank of Watertown v. Landon, 45 N. Y. 410; Flagg v. Stowe, 85 Ill. 164; Field v. Cooks, 16 La. Ann. 153; Chaffe v. Ludeling, 27 La. Ann. 607; Kaiser v. Bank, 56 Iowa, 104, 8 N. W. 772; Martin v. Fewell, 79 Mo. 401.

199 Ridenour v. Mayo, 40 Ohio St. 9.

200 Medill v. Collier, 16 Ohio St. 599, 612; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Second Nat. Bank of Cincinnati v. Hall, 35 Ohio St. 158. In Gartside Coal Co. v. Maxwell, 22 Fed. 197, Brewer, J., said that where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith, and suppose that they are legally incorporated, they cannot be held so liable. In Trowbridge v. Scudder, 11 Cush. (Mass.) 83, the court said that, if members of a corporation give notes, which the corporation is not bound to pay, and which it refuses to pay, the remedy against them is not by an action on the notes, but by an action of tort, as is the remedy against one who signs a note as agent for another without authority.

201 Bates, Partn. § 8.

202 Witmer v. Schlatter, 2 Rawle (Pa.) 359; Garnett v. Richardson, 35 Ark. 144; Farmers' Bank v. Smith, 26 W. Va. 541.

203 National Union Bank of Watertown v. Landon, 45 N. Y. 410.

DELECTUS PERSONARUM.

22. No person can be introduced as a partner without the consent of all those who for the time being are members of the firm.[204]

By the conveyance of a partner to a stranger of his share in the business without the consent of the other partners, the relation would come to an end ipso facto, if the partnership was one to be determined at the will of the partners.[205] If the partnership was not thus determinable, such a conveyance would not have so summary an effect, because, if such was the case, it would lie in the power of a partner always to terminate the relation voluntarily, notwithstanding anything to the contrary he may have agreed to in the articles. In the latter case, however, any of the partners aggrieved by the conveyance would be in a position to have the partnership dissolved upon application to a court of equity.[206] It is not only that the proposal to bring another person in tends, as the effect of some merely arbitrary rule of law, to terminate the relation, but that the partnership loses its identity by any change at all in the membership, according to the strictly legal aspect of a partnership, in which aspect the individual partners are prominent always, to the exclusion of the entity. But such a transfer would, even according to the mercantile aspect, have a similar tendency, because, on ac-

[204] Pol. Partn. art. 38; Story, Partn. §§ 5, 195.

[205] Bates, Partn. §§ 162, 570; Wilson v. Waugh, 101 Pa. St. 233; Carter v. Roland, 53 Tex. 540; Fourth Nat. Bank of New York v. New Orleans & C. R. Co., 11 Wall. 624. See post, p. 397, "Dissolution."

[206] "As regards dissolution, it is remarkable that there should be so little authority to be found. It is generally stated that, if a member of an ordinary partnership transfers his share, he thereby dissolves the partnership; but this proposition requires qualification. The true doctrine, it is submitted, is that, if the partnership is at will, the assignment dissolves it (see Heath v. Sansom, 4 Barn. & Adol. 172); and, if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution. It can hardly be that a partner, who has himself no right to dissolve or to introduce a new partner, can, by assigning his share, confer on the assignee a right to have the accounts of the firm taken, and the affairs thereof wound up, in order that he may obtain the benefit of his assignment." Lindl. Partn. p. 364.

count of a strict confidence in each other being essential with copartners, mutual assent in the mere matter of association is necessarily a vital and governing principle in not only the establishing, but also the maintaining, of the partnership relation. This principle of delectus personarum does not prohibit what is known as a "subpartnership." [207] There is nothing to prevent a partner making an agreement with a stranger, whereby the latter shall participate with him in his share of the profits of the firm; for this subpartner, as the stranger then becomes, has no relations whatsoever with the firm, but only with the person with whom he has contracted.[208] In what are known as "mining partnerships" the principle of delectus personarum does not enter, and the fact that it does not is sufficient to deny to such an enterprise the character of a partnership, in strictness of words.[209] So, also, in joint-stock companies there is no delectus personarum.[210]

Of course, the parties may agree in advance, in the partnership articles, to the admission of new partners by the assignment of any partner's share, or to the admission of the personal representatives of any partner upon his death.[211]

SPECIFIC PERFORMANCE.

23. Specific performance of an agreement for a partnership will not be decreed, except

EXCEPTION—(a) When the execution of an instrument or of articles of partnership are necessary to confer rights upon the other party, or to determine his status, it will be decreed whether the partner-

207 Burnett v. Snyder, 76 N. Y. 344, 349, 81 N. Y. 550.

208 See post, p. 79, "Subpartnerships."

209 See Kahn v. Smelting Co., 102 U. S. 641; Duryea v. Burt, 28 Cal. 569. "In this peculiar kind of partnership there is no delectus personarum, but any partner may assign his share without dissolving the firm. Nor is death a dissolution, and the assignee has his rights and remedies against the other associates." Bates, Partn. § 163. See post, p. 92, c. 2.

210 In joint-stock companies it is agreed in the start that the shares shall be transferable without dissolution, and this is the distinguishing feature of such associations. See post, p. 498.

211 See post, p. 397 et seq.

ship was at will or for a fixed term, but the parties will not be compelled to act under the articles when signed.

(b) Persons may be decreed to be partners, for the purposes of an accounting, after the joint adventure has come to an end.

General Rule against Specific Performance of Agreements for Partnership.

If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, courts will not decree specific performance of an agreement for a partnership.[212] Nor will specific performance be decreed of an agreement to become a partner and bring in a certain amount of capital, or, in default, to lend a sum of money to the plaintiff.[213]

Cases in Which a Decree will be Made.

However, if the parties have agreed to execute some formal instrument, which would have the effect of conferring rights which do not

[212] Scott v. Rayment, L. R. 7 Eq. 112; Hercy v. Birch, 9 Ves. 357; Sheffield Gas Consumers' Co. v. Harrison, 17 Beav. 294; Buxton v. Lister, 3 Atk. 383; England v. Curling, 8 Beav. 129; Syers v. Syers, 1 App. Cas. 174; Buck v. Smith, 29 Mich. 166; Morris v. Peckham, 51 Conn. 128. An agreement for a partnership for a fixed term will not be enforced. See Somerby v. Buntin, 118 Mass. 279; Meason v. Kaine, 63 Pa. St. 335; Stocker v. Wedderburn, 3 Kay & J. 393.

[213] Sichel v. Mosenthal, 30 Beav. 371. Where the contract is merely to contribute capital, an action for damages is an adequate remedy.

exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved.[214] The principle upon which the court proceeds in a case of this description is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired.[215] In England v. Curling,[216] the plaintiff and two of the defendants agreed to become partners as ship agents, for seven, ten, or fourteen years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement. The deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months. He retired from the partnership, and entered into partnership with other persons, and carried on business with them on the premises and in the name of the old firm. The new firm opened the letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree.[217] It is to

214 Buxton v. Lister, 3 Atk. 385; Stocker v. Wedderburn, 3 Kay & J. 403. And see Crawshay v. Maule, 1 Swanst. 513, note. Conveyances of property rights may be enforced. See Story, Partn. § 189; 1 Story, Eq. Jur. 666; Somerby v. Buntin, 118 Mass. 279; Birchett v. Bolling, 5 Munf. (Va.) 442; Satterthwait v. Marshall, 4 Del. Ch. 337; Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Tilman v. Cannon, 3 Humph. (Tenn.) 637; Beckwith v. Manton, 12 R. I. 442; Whitworth v. Harris, 40 Miss. 483. But see Sims v. McEwen's Adm'r, 27 Ala. 184.

215 See Wilkinson v. Torkington, 2 Younge & C. 726.

216 8 Beav. 129. See the observations of Lord Romilly on this case in Sichel v. Mosenthal, 30 Beav. 376.

217 The following was the minute of the decree: "The court doth declare that the agreement for a co-partnership, dated, etc., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the master settle and approve of a proper deed of co-partnership

be noticed that the relief granted was by restraint, and not enforcement, except merely as to signing the deed.

Specific Performance Where an Account Only is Wanted.

The only other class of cases in which anything like specific performance of an agreement for a partnership will be decreed is where a person who has agreed with another to share the profits of some joint adventure seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of cases is afforded by Dale v. Hamilton.[218] There, in substance, three persons had agreed to purchase land, to build on it and improve it, and then to sell it for their common benefit. Land was accordingly obtained, built upon, and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the moneys arising from the sale; and the court held him entitled to this relief.

Another instance of the same kind is afforded by Webster v. Bray.[219] In that case the plaintiff and the defendant had been jointly retained as solicitors to a company. They were not in partnership as solicitors generally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit all payments in respect of such work. The plaintiff, having resigned, filed a bill for an account; and the court made a decree in his favor, declaring that the plaintiff and the defend-

between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed; and let the parties execute it. Continue the injunction against the defendant Curling."

[218] 5 Hare, 369, and 2 Phil. Ch. 266. [219] 7 Hare, 159.

ant were jointly and equally interested in the profits and loss of the business transacted by them, or either of them, as solicitors to the company.[220]

SUBPARTNERSHIPS.

24. A contract between a partner and a third person to share the former's proportion of the profits does not make such third person a member of such partnership.

25. Such a contract creates a subpartnership provided the other requisites of a partnership agreement are present.

A subpartnership is, as it were, a partnership within a partnership. It presupposes the existence of a partnership to which it is itself subordinate.[221] An agreement to share profits only may constitute a partnership between the parties to the agreement. If, therefore, several persons are partners, and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm.[222] The result of such an agreement is to constitute what is called a subpartnership,—that is to say, it makes the parties to it partners inter se; but it in no way affects the other members of the principal firm. Lord Eldon puts the law on this subject very clearly. "I take it," he says, "to have been long since established that a man may become partner with A. where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Chas. Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership, had no demand against it, had no account in it, and that he

220 See, also, Robinson v. Anderson, 20 Beav. 98, 7 De Gex, M. & G. 239.

221 Lindl. Partn. p. 48.

222 Burnett v. Snyder, 76 N. Y. 344, 81 N. Y. 550; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Fitch v. Harrington, 13 Gray (Mass.) 468; Reynolds v. Hicks, 19 Ind. 113; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, and 35 N. E. 693.

must be satisfied with a share of the profits arising and given to Sir Chas. Raymond." [223]

Liability to Creditors.

Since the decision of Cox v. Hickman a subpartner cannot be held liable to the creditors of the principal firm by reason of his participation in the profits thereof.[224]

PARTNERSHIP BY ESTOPPEL—HOLDING OUT.

26. One who so conducts himself as to reasonably induce third persons to believe that he is a partner, and to act upon that belief, is liable as a partner to such person.

The only mode in which a person not a partner becomes liable as if he were one is by so conducting himself as to lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact.[225] The principle of this is obvious and

[223] Ex parte Barrow, 2 Rose, 252, 254. See, also, Bray v. Fromont, 6 Madd. 5; Nirdlinger v. Bernheimer, 133 N. Y. 45, 30 N. E. 561.

[224] Burnett v. Snyder, 81 N. Y. 550; Setzer v. Beale, 19 W. Va. 274. Cf. Fitch v. Harrington, 13 Gray (Mass.) 468; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336. "Where the so-called 'subpartner' owns the entire interest, including profits and property, he must be considered as the real partner, standing in the place of the ostensible one, and assuming his obligations and liabilities." Webb v. Johnson, 95 Mich. 325, 54 N. W. 947.

[225] Where a person holds himself out as a partner to a party giving credit to the supposed firm, and by his conduct or declaration induces such person to give credit in the honest belief that he is a partner, he will be held liable as a partner. "The law will therefore hold him liable, upon principles of general policy, and for the prevention of frauds upon creditors." Poole v. Fisher, 62 Ill. 181. One who holds himself out as a partner is estopped to deny the partnership relation, as against those who have extended credit on such representation. Bissell v. Warde, 129 Mo. 439, 31 S. W. 928. One who, by his acts and declarations in dealing with a bank, holds himself out to it as a member of a firm, thus inducing the bank to discount notes, and pass the proceeds to the credit of the firm, will be liable to the bank on the notes as a member of the firm. Lancaster County Nat. Bank v. Boffenmyer, 162 Pa. St. 559, 29 Atl. 855. See, also, Shafer v. Randolph, 99 Pa. St. 250; French v. Barron, 49 Vt. 471; Sherrod v. Langdon, 21 Iowa, 518; Martyn v. Gray, 14 C. B. (N. S.) 824; Sun Ins. Co. v. Kountz Line,

satisfactory, and is well laid down by Chief Justice Eyre in the famous case of Waugh v. Carver.[226] His lordship there said: "Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing."

The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct. It is therefore wholly immaterial whether the person holding himself out as a partner does or does not share the profits or losses.[227] In M'Iver v. Humble,[228] Lord Ellenborough said: "A person may make himself liable as a partner with others in two ways: Either by participation in the loss or profits, or in respect of his holding himself out to the world as such, so as to induce others to give credit on that assurance." It will be readily seen that the rule of partnership liability here first mentioned does not apply in the case of a nominal partner, because he does not participate in the profits at all, and is, in fact, in no wise a partner, within the technical sense of the word.[229]

122 U. S. 583, 7 Sup. Ct. 1278; Brown v. Pickard, 4 Utah, 292, 9 Pac. 573. Where a person, by his conduct, conversation, admissions, or otherwise, allows himself to be held out as a member of a prospective firm, and thereby a third party is induced to credit such firm, such person, to the extent of liability thus incurred, is estopped from denying the existence of such firm. Moore v. Harper (W. Va.) 24 S. E. 633.

226 2 H. Bl. 235, 246, 1 Smith, Lead. Cas. (8th Ed.) 1316. See, also, Scarf v. Jardine, 7 App. Cas. 345.

227 Ex parte Watson, 19 Ves. 461; Kirkwood v. Cheetham, 2 Fost. & F. 798.

228 16 East, 169, 174.

229 See post, p. 96. Holding out does not render one an actual partner. Grabenheimer v. Rindskoff, 64 Tex. 49. But an allegation of a partnership in

His liability attaches merely through the operation of the principle of estoppel. In De Berkom v. Smith,[230] Lord Kenyon is reported as saying: "Though, in point of fact, parties are not partners in trade, yet if one so represents himself, and by that means gets credit for the goods for the other, both shall be liable." The liability of the person holding himself out is not the less either if he has been induced by the others to do so through fraud or promises of being shielded from responsibility, provided the person giving credit took no part in the promises or fraud.[231] In order to charge a person, it is not necessary that the holding out should be his deliberate act, for his liability is as great if he has merely permitted himself to be held out as a partner by the trader himself, although the theory was once advanced that the extent of the liability differed in the two cases.[232] A mere protest to the trader will not relieve a person of liability where he has been thus held out. He must take active means to warn customers; otherwise, he may be said to have acquiesced.[233]

fact is sustained by proof that the person sought to be charged held himself out as a partner, or acquiesced in being so held out by others. Frank v. Hardware Co. (Tex. Civ. App.) 31 S. W. 64. A transfer of firm assets in payment of a bona fide firm debt is valid, though made by one not an actual partner, if he has been previously held out as such, and the purchasing creditor has no notice prior to the consummation of the sale that the supposed co-partner does not consent thereto. More v. Dixon, 59 Ill. App. 167. One who holds out another as his partner will be liable as such for the acts of the other in the name and on account of the firm, if within the scope of the firm's business, though he was not consulted in the matter. Hess v. Ferris, 57 Ill. App. 37. In Guidon v. Robson, 2 Camp. 302, Lord Ellenborough held that a nominal partner must join as plaintiff in an action on a contract made in the firm name. But see Kell v. Nainby, 10 Barn. & C. 20; Bishop v. Hall, 9 Gray (Mass.) 430; Beudel v. Hettrick, 35 N. Y. Super. Ct. 405.

230 1 Esp. 29.

231 Lindl. Partn. p. 41; Collingwood v. Berkeley, 15 C. B. (N. S.) 145; Maddick v. Marshall, 16 C. B. (N. S.) 387, 17 C. B. (N. S.) 829; Ellis v. Schmoeck, 5 Bing. 521; Ex parte Broome, 1 Rose, 69.

232 J. Pars. Partn. § 69.

233 Smith v. Hill, 45 Vt. 90. Cf. Rittenhouse v. Leigh, 57 Miss. 697. See, generally, Wright v. Boynton, 37 N. H. 9; Ihmsen v. Lathrop, 104 Pa. St. 365; Bowie v. Maddox, 29 Ga. 285; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625; Potter v. Greene, 9 Gray (Mass.) 309; Polk v. Oliver, 56 Miss. 566. "If he is held out as a partner, and knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do under similar circumstances to

If the effort to thus hold him out is persistently made by others, he has access to equity to restrain the persons so persisting. Of course, the use of a man's name without his knowledge cannot subject him to liability;[234] but, where he has been held out without protest on his part, circumstances may convict him of having such knowledge.[235] The fact alone of his having been so held out for an indefinite period, without making any effort to relieve himself of the repute so acquired, would raise a presumption of acquiescence on his part.[236] If not sui juris at the time, he must disaffirm the partnership upon becoming so; otherwise, he may be considered to have thus acquiesced.[237] The most usual case of holding out arises from a failure by a retiring partner to properly notify customers of his severing his connection with the firm.[238] But even if he has not, upon so retiring, published the fact,

assert and manifest his refusal, and thereby prevent innocent parties from being misled. If he does anything which might fairly produce the impression that he is a partner, or, when another does this, fails to do what he should to remove or prevent this impression, then he is as much liable as if he calls himself a partner." T. Pars. Partn. (4th Ed.) § 95.

234 Bates, Partn. § 95. See Ihmsen v. Lathrop, 104 Pa. St. 365; Bishop v. Georgeson, 60 Ill. 484; Kritzer v. Sweet, 57 Mich. 617, 24 N. W. 764; Slade v. Paschal, 67 Ga. 541; Rimel v. Hayes, 83 Mo. 200, 209; Cassidy v. Hall, 97 N. Y. 159; Denithorne v. Hook, 112 Pa. St. 240, 3 Atl. 777. Cf. Smith v. Hill, 45 Vt. 90. One who lends money to a firm is not estopped by representations of the members of the firm that such money constituted part of the capital, where he had no knowledge of such representations. Thomas Adams & Co. v. Albert, 87 Hun, 471, 34 N. Y. Supp. 328.

235 Holland v. Long, 57 Ga. 36. See Craig v. Alverson, 6 J. J. Marsh. (Ky.) 609; Nicholson v. Moog, 65 Ala. 471. "It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding was with his authority, knowledge, or assent." Fletcher v. Pullen, 70 Md. 205, 213, 16 Atl. 887, 888.

236 Thompson v. Bank, 111 U. S. 529, 537, 4 Sup. Ct. 689.

237 Goode v. Harrison, 5 Barn. & Ald. 147 (infant); Everit v. Watts, 10 Paige (N. Y.) 85. "It is an anomaly that one who is not sui juris could be bound as a partner. But, if he does not disaffirm the partnership when he becomes sui juris, he will be a partner, and, by relation, from the beginning." J. Pars. Partn. § 69.

238 See post, p. 257. See, also, Newsome v. Coles, 2 Camp. 620; Hastings Nat. Bank v. Hibbard, 48 Mich. 452, 12 N. W. 651; Boyd v. McCann, 10 Md. 118;

he is not liable to new customers of the firm who never heard of him,[239] although the old ones, who still deal with the firm relying on him, are entitled to look to him with the other members still.[240] The impression under which the third person acted in giving credit to the trader must not have been the effect of a mere rumor that the person sought to be charged was a partner. The information must have been somewhat specific, although not necessarily direct, upon which the third person acted in giving the credit.[241] Thus, it is said by Parke, J., in Dickenson v. Valpy:[242] "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted on that statement."

In no case can liability attach to the nominal partner in favor of any one who has not given credit in full faith in his being a member of the firm, for it is there that the element of estoppel comes in, which is the vital element in the situation.[243] The only ground for charging

Tregerthen v. Lohrum, 6 Mo. App. 576. The firm of J. D. P. & Co. gave plaintiff a note, after which a notice was published, and seen by plaintiff, stating that the partnership formerly existing between J. D. P. and A. J. G., under the firm name of J. D. P. & Co., is dissolved, and that the business will be carried on under the firm name of J. B. G. & Co., who will settle all claims of the late partnership. Afterwards plaintiff surrendered such note, and took a note signed "J. B. G. & Co.," believing that J. B. G. & Co. was a firm consisting of J. B. G. and A. J. G.; but there was in fact no such firm, the business being conducted under such name by J. B. G. alone. Held, that A. J. G. was liable on the new note. Thayer v. Goss, 91 Wis. 90, 64 N. W. 312.

239 Carter v. Whalley, 1 Barn. & Adol. 11. See post, p. 264.

240 See post, p. 261.

241 But a person may be held out, although his name is concealed, as where he is referred to as a person who does not wish to have his name disclosed. See Lindl. Partn. p. 42; Martyn v. Gray, 14 C. B. (N. S.) 824.

242 10 Barn. & C. 128, 140.

243 In Young v. Axtell, cited in Waugh v. Carver, 2 H. Bl. 242, it was said that

such a person as a partner is that, by his conduct in holding himself out as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership.[244] There is a celebrated case in the books, where a retired partner had not used diligence to have his name removed from the firm's place of business, and in particular from a cart used in the business. By the negligence of the driver, the cart was driven over a pedestrian, to the latter's injury, and the ex-partner was made liable for the injury, inasmuch as he had allowed himself to be held out as a partner.[245] This case has been much criticised, and un-

it makes no difference in such a person's liability that the party seeking to charge him did not know at the time when he gave credit to the firm that he had so held himself out. With reference to this case it is said in a note to Waugh v. Carver, 1 Smith, Lead. Cas. (8th Ed.) 1337: "But this position appears very questionable; for the rule which imposes on a nominal partner the responsibilities of a real one is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm of which he holds himself out as a member, on the faith of his apparent responsibility. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies, and there is not wanting authority opposed to such an extension of the rule respecting a nominal partner's liability." In Alderson v. Pope, 1 Camp. 404, note, it was held that a man could not be charged as a partner by one who, when he contracted, had notice that he was but nominally so. Krans v. Luthy, 56 Ill. App. 506. The reason of this must have been because he could not have been deceived, or induced to deal with the firm, by any reliance on the nominal partner's apparent responsibility. And the same reason precisely applies, whether the false impression on the customer's mind has been put an end to by a notice, or whether, in consequence of his ignorance that the nominal partner's name has been used, no false impression ever existed on his mind at all. See Webster v. Clark, 34 Fla. 637, 16 South. 601; Carter v. Whalley, 1 Barn. & Adol. 11; Ford v. Whitmarch (Exch., Mich. Term, 1840) Hurl. & W. 53; Pott v. Eyton, 3 C. B. 32; Edmundson v. Thompson, 31 L. J. Exch. 207; Stephens v. Reynolds, 2 Fost. & F. 147. A person cannot be held liable on a contract on the ground of holding out, unless he did so before the contract was made. Baird v. Planque, 1 Fost. & F. 344; Howes v. Fiske (N. H.) 30 Atl. 351. See, generally, Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887; Hahlo v. Mayer, 102 Mo. 93, 13 S. W. 804, and 15 S. W. 750; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614; Webster v. Clark, 34 Fla. 637, 16 South. 601; Knard v. Hill, 102 Ala. 570, 15 South. 345.

244 Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689.

245 Stables v. Elly, 1 Car. & P. 614.

favorably; for it stands to reason that the injured party had not suffered through giving credit to any name whatsoever. As Pollock says: [246] "To make a man liable in tort as an apparent partner seems to involve confusion of principles." But in Young v. Axtell,[247] which arose on contract, Lord Mansfield would appear to have been quite as indifferent as was the court in the tort case to the principle underlying responsibility in respect of persons holding out; for there the person made responsible had, unknown to the plaintiff, held herself out as a partner, so that credit clearly was not given on account of her name. However, it has been supposed in some quarters that Young v. Axtell was reported in such a manner as to do injustice to Lord Mansfield. Nevertheless, this precedent seems to have misled the court in the American case of Poillon v. Secor.[248] There, instead of the firm designation being changed in respect of the removal from it of the surname of the retiring partner, a person of the same surname had been induced, in consideration of $200, to have that part of the designation represent him, although otherwise he took no part in the firm or its business. This person was subsequently held responsible for a firm debt, without the plaintiffs being required to show that, at the time of its creation, they knew or thought that defendant was a partner; the court saying that the fact of defendant's having received a consideration for permitting the use of his name in the firm under the circumstances was sufficient to charge him, and defining the object of the rule governing persons holding themselves out as partners, to be to prevent the extension of unsound credit, which the court said was "a clear recognition of the element of public policy underlying the rule of Lord Mansfield." [249] If the plaintiff had, at the time the debt was contracted, been aware of all the facts subsequently learned by him, then the party held liable

[246] Pol. Partn. (3d Ed.) p. 25.

[247] Cited in Waugh v. Carver, 2 H. Bl. 242.

[248] 61 N. Y. 456. Cf. Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689.

[249] Mr. James Parsons explains the decision in this case on the theory that "every one dealing with the firm relies upon a partner behind the name, and, upon finding him, holds him, without anything more." Partn. (Index) p. 657. But the question is, is not this a new principle again? However Mr. Parsons may thus vindicate the ultimate justice of the disposition of the case, the explanation does not seem to bring the court's ruling within the principle of estoppel by conduct, which can only conclude the defendants with respect to those who have altered their condition on the faith of the representations being true.

would have been properly so held, beyond all doubt. His stipulating for indemnity for the use of his name, and the plain inference therefrom that he was not a partner in the common sense, would not have rendered him any the less to be relied on by third persons, since by the sole act of lending his name he had invited such reliance; for one actually holding himself out may be liable, even where it is known, by the party giving credit on faith of his name, that he intended to participate in neither profits nor losses.[250] The question of whether one has held himself out as a partner in any given case is a mixed question of law and fact, just as is always the question whether a partnership has existed or not.[251] The judge is to instruct so as to let the jury know what constitutes a holding out, leaving then to the jury the province of finding whether the essentials so charged have been proved to exist by the testimony produced.[252]

[250] "His name does not induce credit the less on account of his right to be indemnified by others against any loss falling in the first instance on himself; and although, in the case supposed, he cannot be believed to be a partner, the lending of his name does justify the belief that he is willing to be responsible to those who may be induced to trust him for payment." Lindl. Partn. p. 40. See Brown v. Leonard, 2 Chit. 120; but see Alderson v. Pope, 1 Camp. 404, note.

[251] See ante, p. 33.

[252] Seabury v. Bolles, 51 N. J. Law, 103, 16 Atl. 54; Id., 52 N. J. Law, 413, 21 Atl. 952; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887. "Whether a defendant has or has not held himself out to the plaintiff is in every case a question of fact, not a question of law, and the consequence is that there is great apparent conflict in the cases on this head. In Wood v. Duke of Argyll, 6 Man. & G. 928, and in Lake v. Duke of Argyll, 6 Q. B. 477, the very same acts were relied on as a holding out, viz. being advertised as president of a society, acting as president at a meeting, and signing some resolutions then agreed upon. In the first case, this was considered not sufficient, and the defendant had a verdict; whilst in the last it was considered to be sufficient, and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the court in each case refused to disturb the verdict." Lindl. Partn. p. 44.

CHAPTER II.

KINDS OF PARTNERSHIPS AND PARTNERS.

27. Classification of Partnerships.
28. Ordinary Partnerships—Universal, General, and Special or Particular.
29. Limited Partnerships.
30. Joint-Stock Companies.
31. Trading and Nontrading Partnerships.
32. Mining Partnerships.
33. Classification of Partners.

CLASSIFICATION OF PARTNERSHIPS.

27. Partnerships may be divided into three classes:

(a) Ordinary partnerships (p. 88).

(b) Limited partnerships (p. 90).

(c) Joint-stock companies (p. 90).

ORDINARY PARTNERSHIPS—UNIVERSAL, GENERAL, AND SPECIAL OR PARTICULAR.

28. Ordinary partnerships may be divided, in respect to their extent, into three classes:

(a) Universal partnerships.

(b) General partnerships.

(c) Special or particular partnerships.

Universal, General, and Special or Particular Partnerships.

A universal partnership would exist if the parties agreed to bring into the firm all their property, and to employ all their skill, labor, and services in business for their mutual benefit, so that there would be an entire community of interest between them.[1] Theoretically, such a relation is possible, and in this country there are several cases which approach it very nearly.[2] But such partnerships are nat-

[1] Story, Partn. § 71.

[2] Gray v. Palmer, 9 Cal. 616; Gasely v. Society, 13 Ohio St. 144; Lyman v. Lyman, 2 Paine, 11, Fed. Cas. No. 8,628; Goesele v. Bimeler, 14 How. 589;

urally of very rare occurrence, and must be clearly established, for they will not readily be presumed.

A general partnership is one where the partners have associated together for the purpose of transacting a branch of trade or business which is more or less permanent, whereas a special or particular partnership is one for the transaction of a single venture.[3] These divisions are of no particular importance.

Houston v. Stanton, 11 Ala. 412; Baker v. Nachtrieb, 19 How. 126; Rice v. Barnard, 20 Vt. 479; Hamilton v. Halpin, 68 Miss. 99, 8 South. 739. "There is probably no such thing as a universal partnership, if, by the terms, we are to understand that everything done, bought, or sold is to be deemed on partnership account. Most men own some real or personal estate, which they manage exclusively for themselves." United States Bank v. Binney, 5 Mason, 176, 183, Fed. Cas. No. 16,791. By the law of Mexico in force in California before its cession to the United States, the partnership relation existed between the husband and wife in all property acquired by the spouses by their labor, and in the income of the individual property of either, and in the gains of the husband by the exercise of a profession or office, and also in the gains from the money of the spouses, although the capital was the separate property of one of them. Fuller v. Ferguson, 26 Cal. 546.

[3] "A general partnership is one created for the purposes of some general kind of business, or of a number of kinds of business. A special or particular partnership is one created for a single transaction or adventure." Mechem, Partn. § 15. "A particular partnership is one where the parties have united to share the benefit of a single individual transaction or enterprise. A general partnership is one where they have united for the general purposes of some kind of business." Bates, Partn. § 12. "Special partnerships relate only to an ownership or use or employment by partners of one thing, or one cargo, or one mercantile adventure." T. Pars. Partn. § 40. There has been a good deal of confusion in the definition and use of these terms. Thus Story says: "General partnerships are properly such where the parties carry on all their trade and business, whatever it may be, for the joint benefit and profit of all the parties concerned, whether the capital stock be limited or not, or the contributions thereto be equal or unequal." This definition would make the term "general partnership" synonymous with "universal partnership." Story follows this up by saying: "But where the parties are engaged in one branch of trade or business only, the same application is ordinarily applied to it." But this last class falls squarely within his definition of special partnerships, which is as follows: "Special partnerships, in the sense of common law, are those which are formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them." Section 75. "They are more commonly called 'limited partnerships' when they extend to a single transaction or adventure only; such as the purchase and sale on joint account of a particular parcel of goods, or the under-

LIMITED PARTNERSHIPS.

29. "A limited partnership is a partnership in which the liabilities of some of its members to bear losses is restricted to a defined amount."[4]

In the "ordinary" partnership each of the partners is severally liable for firm debts, but in the "limited" partnership this several liability does not affect all the partners to the full extent of such debts. At common law, partners were invariably liable for the full amount of partnership debts. Limited partnerships, therefore, exist solely by virtue of statutes.[5]

JOINT-STOCK COMPANIES.

30. A joint-stock company is a partnership with a capital divided into transferable shares.

There is still another sort of business relation (in vogue in England more than in this country) that comes within the realm of partnership law to some extent. The reference is to what are known as joint-stock companies.[6] Resort is had to this mode of associa-

taking of a voyage or adventure to foreign parts upon joint account. But the appellation may be applied indifferently, and without discrimination, to both classes of cases." Story, Partn. § 75. It will be observed that according to Story these terms have no definite meaning whatever, and leave the mind hopelessly confused. "It must be noticed, however, that these names 'limited partnership' and 'general partnership' thirty or forty years ago meant something very different, and denoted respectively a partnership whose scope or objects were restricted to a certain class of business or particular adventures, or were not so restricted. But an abandonment of the term 'general' in the sense of 'universal' will be no loss; for a partnership without any limitation as to its scope and purposes is an anomaly, and, at least as far as I can discover, there are but four cases on record of such general hotchpot or communistic concern." Bates, Lim. Partn. § 1, citing cases in note 2, supra.

[4] Bates, Lim. Partn. § 1.

[5] See post, c. 10.

[6] See post, c. 11. See, also, Add. Cont. 805; Lindl. Partn. 756; Beach, Priv. Corp. 167.

tion usually in cases where the business enterprise is of a more extensive and elaborate nature than what falls, as a rule, within the compass of ordinary partnerships.[7] In England the incorporation of companies is not the common thing it is here, and, indeed, is granted only in rare instances;[8] and whereas, in America, persons would, in contemplation of embarking in such enterprises, form themselves usually into corporations under the laws of the several states, in England resort would be had by such persons to the establishment, under somewhat similar laws there, of these joint-stock companies; the purpose in each case being escape by the individual of liability, to the full extent, for the debts of the association. The business management of these companies is committed to a board of directors, just as is the case with corporations; similarly, too, the capital is divided into shares, and each shareholder participates in the profits in proportion to his holdings. These shares, as in the case of a corporation, but not as in the case of a partnership, are assignable at the will of the holder.[9] Finally, "the rights inter se of the members of a joint-stock company are regulated by the joint-stock companies acts,[10] and by the memorandum and articles of association. When these are silent, the ordinary law of partnership applies." [11] Thus, in the absence of statute, the members of a joint-stock company, like the members of an ordinary partnership, are individually liable for all the debts of the company.[12]

TRADING AND NONTRADING PARTNERSHIPS.

31. A trading partnership is one engaged in buying and selling as a business.

"The test of the character of the partnership is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation." [13] "Trading," in its business sense, signifies, as a rule, the buying to sell

[7] Add. Cont. (8th Ed., Abbott's Notes) 805. [8] Id. [9] See ante, p. 4.

[10] 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131. See, also, N. Y. Laws 1881, c. 599; Laws 1868, c. 290; Laws 1867, c. 289; Laws 1854, c. 245.

[11] Add. Cont. 805. [12] See post, p. 501.

[13] Lee v. Bank, 45 Kan. 8, 25 Pac. 196.

again; but what are known as trading partnerships include also partnerships formed for manufacturing or mechanical purposes. The importance of the distinction between trading and nontrading partnerships lies in the fact that it is only in the case of trading partnerships that a partner has implied power to borrow money and give firm mercantile paper therefor. This subject will be treated more at length hereafter.[14]

Trading and nontrading partnerships may be either general or special, ordinary or limited.

MINING PARTNERSHIPS.

32. Where tenants in common of a mine work it together, and divide the profits in proportion to their interests, they are mining partners.[15]

Mining partnerships, as the name imports, are established for the purpose of prosecuting mining operations. They are a cross between tenancies in common and partnerships proper.[16] Their chief peculiarity is the absence of the delectus personarum, which is essential to a true partnership. The shares of a mining partnership can be assigned ad libitum, and the death of a partner, or his retiring from the firm, does not dissolve the partnership.[17] But there is nothing in the nature of mining which forbids a contract of strict partnership; and when it appears that the confidential relations of an ordinary partnership are established, and the firm not subject to the intrusion of other partners at will,—that is, where there is a delectus personæ,—the ordinary incidents of partnership attach.[18]

[14] See post, p. 224.

[15] Nolan v. Lovelock, 1 Mont. 224.

[16] Bates, Partn. § 14.

[17] Kahn v. Smelting Co., 102 U. S. 641.

[18] Decker v. Howell, 42 Cal. 636. Cf. with the case of joint owners of ships, ante, p. 8, and notes 21 and 22.

CLASSIFICATION OF PARTNERS.

33. Partners have been divided into various classes, such as:

(a) **General** (p. 93).
(b) **Special** (p. 93).
(c) **Ostensible** (p. 93).
(d) **Secret** (p. 94).
(e) **Silent** (p. 94).
(f) **Dormant** (p. 95).
(g) **Nominal** (p. 96).

These classes are not necessarily mutually exclusive, nor are the distinctions between them of much importance, except in the case of general and special partners. For, although there recur in the books again and again such words as "ostensible," "secret," "silent," "dormant," "nominal," etc., in connection with the word "partner," each has its effect to qualify, like any other adjective, the adjacent word, rather than to furnish the subject in any way with a separate classification. It will be useful, however, to briefly consider the meaning and use of each of these terms.

General and Special Partners.

A general partner is one whose liability for partnership debts is unlimited; who is liable in solido. All members of ordinary partnerships are necessarily general partners. The term, as used in this connection, has nothing to do with the division of ordinary partnerships into universal, general, and special partnerships.[19] A special partner is one whose liability for firm debts is limited to a defined amount. Necessarily, such partners exist only in the case of limited partnerships. All the partners, however, in a limited partnership, are not special partners. There must always be one or more general partners, as well as one or more special partners.[20]

Ostensible Partners.

An ostensible partner is one whose connection with the firm is openly avowed. This connection may appear by means of the firm

[19] See ante, p. 88.

[20] As to general and special partners, see post, c. 10, "Limited Partnerships."

sign or otherwise, the significance of the description being that there is no concealment about his relation to the firm.[21]

Secret Partners.

A secret partner is one, on the other hand, whose connection with the firm is concealed, or at least is not announced or made known to the public.[22]

Silent Partners.

A silent partner, while having his right to a share of the firm profits as a partner, yet is tacit; that is, has no voice in the management of the partnership business. Although the true character of a partner depends on his being at once a principal and agent, yet the power of some particular partner to bind the firm may be restricted by an agreement between the parties themselves. Such a restriction would not, of course, be allowed to work to the detriment of a third person deeming himself, upon good grounds of belief, in dealing with a partner, to be dealing with the firm. Yet the mere fact that one is a partner—that fact being at the time unknown to the third person—will not probably, if such partner is under such a restriction meanwhile, render the firm liable, although the representation was that the firm was being dealt for. In the case, for instance, of a dormant partner,—a partner who is both secret and silent, as will appear below,—if the third person took him on his own representations merely, not knowing him to be a partner otherwise, that third person was put sufficiently on inquiry to relieve the firm of liability for the dormant partner's unauthorized acts. The question does not seem to have been satisfactorily decided as to what notice is sufficient to relieve the firm from liability to third persons who have dealt with a partner restricted in his authority to act for the firm. Lindley says that it must be explicit, a distinct warning, in fact, that the firm will not be responsible for the acts of such a partner; for, he argues, a private agreement within the firm may be perfectly consistent with an intention that the firm shall still be liable notwithstanding the restriction, the real effect of the agreement being that such partner shall reimburse the firm after it has suffered by his acting in the face of the agree-

[21] Bates, Partn. § 9.

[22] Bates, Partn. § 10.

ment.[23] And Pollock,[24] commenting on this view of the subject, cites the case of Brown v. Leonard,[25] not as directly in point, but as affording an illustration of how far a third person dealing with a firm is bound by a mere casual statement of the nonliability of an apparent partner. There the latter had informed the third person that he had ceased to be a partner, although his name was to continue in the firm for a certain time; and it was held by the court that the statement was no disclaimer. There is no special form of words recognized as necessary to convey such notice, and no especial method of conveying it, if only notice in some form reaches the person who is about to give the credit. The sufficiency of the notice is, it was held in Vice v. Fleming,[26] a question for the jury. In the latter case, Garrow, B., said: "All the partners of a firm are liable for the debts contracted by that firm, but this responsibility may be limited by express notice by one that he will not be liable for the acts of his co-partners. The question is whether the defendant has done that in this case. He states the then condition of the firm, and says, 'A new order of things is about to take place, by which I shall be discharged from all future liability;' not 'I will not be responsible,' but 'I have sold my share, and shall, in consequence, be discharged.' If the notice had been of the former description, the plaintiff might have declined to supply the mine for the future; but when he is told the responsibility of others is to be substituted for that of the defendant, he is induced to continue the supplies upon the credit of the supposed new partner; and, as none such existed, I think the defendant, so long as he remained a partner, was liable."

Dormant Partners.

A dormant partner combines in himself the characters of both the secret and the silent partners.[27] Whether or not he seeks to withhold from the public the fact that he is a partner, he is not published as one through the firm name or otherwise; but he is one nevertheless, although by mutual agreement of all the partners he

[23] Lindl. Partn. p. 174. See Gallway v. Mathew, 10 East, 264; Alderson v. Pope, 1 Camp. 404, note.

[24] Pol. Partn. art. 20.

[25] 2 Chit. 120.

[26] 1 Younge & J. 227.

[27] See Bates, Partn. § 10.

does not transact any of the business of the firm. Being thus a partner, however, he maintains the relation of principal to the agent or fellow partner, who does transact firm business; and in this respect he is to be distinguished from a person who shares profits of a business carried on by others, not as the agents of such a person, but on their own account as principals. Under the decision in Cox v. Hickman,[28] this person has no partnership liability, whereas the dormant partner has, and, when discovered, will be held to it, even where he has attempted to disguise himself as a lender; as was the case in Pooley v. Driver.[29] He may be said to be always at the mercy of others in respect of being subjected to the payment of debts which he, but for them, might escape; being liable to be so subjected at any time by his membership in the firm being exposed through accident or design. This secret being once divulged, he is a disclosed principal, and liability for firm debts and obligations adheres to him as well under the law of principal and agent as of partnership. But, if his connection with the firm is not thus disclosed, and he at length ceases to be a partner, knowledge thereafter of the old connection will not avail any one then trading with the firm in seeking to fix a liability on him. From this principle the maxim has arisen that "a dormant partner may retire from the firm without giving notice to the world." [30] He is still liable, however, for firm debts contracted before his retirement;[31] and a creditor of two partners, one of whom he is not aware of, can hold the latter after his retirement, notwithstanding any arrangement, short of the extinguishment of the debt, previously had with the partner then known, for in his ignorance of having a security the creditor could not release it.[32]

Nominal Partners.

A nominal partner is the expression used to describe a person who has acquired the name, with outside persons, of being a partner without necessarily participating in the profits. Liability attaches to him by reason of his own act or negligence alone, another not being

[28] 8 H. L. Cas. 268.

[29] 5 Ch. Div. 458.

[30] See post, p. 264; Carter v. Whalley, 1 Barn. & Adol. 11; Lindl. Partn. p. 212.

[31] Lindl. Partn. p. 178.

[32] Lindl. Partn. p. 245, citing Robinson v. Wilkinson, 3 Price, 538.

able to subject him to it. What are known as partners by holding out come within this description. Such a person, having courted liability for the firm's debts, can in certain cases be made to pay them, notwithstanding his not being really a member of the firm.[33]

[33] See ante, p. 80, "Partnership by Estoppel."

CHAPTER III.

CHARACTERISTIC FEATURES OF PARTNERSHIPS.

34–35. Partnership as an Entity—Legal and Mercantile View.
36. Partnership Name.
37–38. Partnership Property.
39. Partnership Capital.
40. Contributions Other than in Money.
41–42. Partners' Rights as to Capital.
43. Advances by Partner.
44. Limitations as to Contributions to Capital.
45. Partnership Property in General.
46. What Constitutes.
47. Property Habitually in Use of Firm.
48. Property Purchased with Partnership Funds.
49. Title to Real Estate.
50. When Partnership Realty Deemed Personalty.
51–52. Conversion of Partnership Property into Separate Property, and Vice Versa.
53. Partnership Shares.
54–55. Nature of Partner's Interest.
56–57. Amount of Each Partner's Share.
58. Sale of Partner's Interest on Execution.
59–60. Transfer of Shares.

PARTNERSHIP AS AN ENTITY—LEGAL AND MERCANTILE VIEW.

34. The common law does not recognize a partnership as an entity existing, and having rights and liabilities, apart from its members. Merchants generally do regard a partnership as such an entity.

35. The term "a firm" is a conventional phrase expressive of the partnership as distinct from its members.

What is known as the "firm" is the aggregation of the individuals composing the partnership in their character as partners. The word is a convenience, as it dispenses with the necessity of some little circumlocution at times in expressing a simple idea; for instance, when it is desired by partners and others to speak of the partnership in contradistinction to the partners, and of the part-

ners in contradistinction to the partnership. It is properly an expedient for escape from a clumsy mode of expression, rather than anything else. The form of the word, as employed, is about equal to the abstract idea of partnership, and the words, "house," "concern," "company," are frequently used with a like significance; all being merely conventional terms, except that, as a means of identifying contracting parties, they are given importance if evidence is forthcoming to show just who were members of the partnership at the time of acts done in the firm name, such members being bound by such acts, providing they were done by a person properly authorized.

Legal and Mercantile Views Contrasted.

The law gives, technically, a partnership scant recognition, except as respects its individual members, so that the "firm," as something other than its individual members, is known rather to the lay community than to the courts.[1] So it has come about that such a manner as this latter one of regarding a partnership is said to be the mercantile, in contradistinction to the legal, view. It will be found that partners, in their dealings with each other as such, usually regard the situation with reference only to the relation of each of them to the firm. If the same individuals compose two firms, of different names and localities, these individuals will regard these firms as wholly distinct from each other, and, in all their dealings, will preserve this distinction in their accounts. If the firm of Smith & Brown is indebted to William Jones, Jones looks for payment, properly, according to the legal view of a partnership, to John Smith and Thomas Brown, the partners composing the firm; but Smith or Brown regards this as a "firm debt," for which he per-

1 This view, although thus generally discredited in law at this time, seems to have the merit of age to recommend it. Mr. Parsons tells us that it is a relic of feudal times, and is tinctured with the old feudal ideas of property, which cling still to the law of real estate, the genius of modern jurisprudence having ordained differing modes of treatment of things real and things personal, and having made the latter to follow rather than control the person in respect of rights and obligations. J. Pars. Partn. § 103. The idea of the firm being an entity figured certainly also in the civil law (see Code Nap. bk. 3, tit. 9); and it is not surprising to find the mercantile view prevailing as the legal one in the state of Louisiana, where the firm is called "a moral being," and "a civil person with peculiar rights and attributes" (see Succession of Pilcher, 39 La. Ann. 362, 1 South. 929).

sonally is liable only in default of the firm's paying it. In other words, John Smith and Thomas Brown are disposed to look on themselves in the light of sureties for the firm in the premises.[2] Again, if John Smith has overdrawn his share of the profits of Smith & Brown, so that the remaining profits will not suffice to pay Thomas Brown his share, in commercial phrase it will be said that Smith owes the firm, and that the firm owes Brown, although such phrase is, according to the legal aspect of the question, altogether erroneous. "In point of law, a partner may be the debtor or creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member."[3] These instances are given here to illustrate the two different views taken of the firm; the one being the legal, and therefore the true, one, and the other the commercial or mercantile view, whereby the firm appears in an impersonal light, very much like a corporation, except for the manner of its coming into being. The subject is susceptible of being understood only by attributing at least two aspects to partnership, whether we attribute to it two characters or not, particularly since the authorities all recognize the twofold aspect as existing, while only some of them insist on there being the two actual, separate, and distinct characters. It is needless to here enter upon a controversy where so little substance appears in prospect of being gained, whether it is found that partnership is a relation only, or also an entity,—a thing distinct from its component members.[4]

[2] Lindl. Partn. p. 111.

[3] Lindl. Partn. 111. See Lord Cottenham's judgment in Richardson v. Bank, 4 Mylne & C. 171, 172, and De Tastet v. Shaw, 1 Barn. & Ald. 664.

[4] "A partnership or joint-stock company is just as distinct and palpable an entity, in the idea of the law, as distinguished from the individual composing it, as is a corporation, and can contract as an individualized and unified party, with an individual person who is a member thereof, as effectually as a corporation can contract with one of its stockholders. The only practical difference is a technical one, having reference to the forum and form of remedy." Walker v. Wait, 50 Vt. 668. "The partnership, for most legal purposes, is a distinct entity, having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers." Robertson v. Corsett, 39 Mich. 777. "When one joins a partnership, he makes himself a part of an entity already existing, which has acquired certain property and business, and, in acquiring it, has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts." Cross v. Bank, 17 Kan.

How Far the Law Regards a Partnership as an Entity.

By statute, in many of the states, recognition has been so far given to the commercial idea of partnership that actions may be brought against partnerships in the firm name; the judgment being, however, enforceable only against the common property of the partners, and the private property of only the partner actually served with process.[5] In England, too, the rules of the supreme court permit the institution of actions both by and against partners, actual members of the firm at the time, in the firm name,[6] and in a few other cases such recognition is intimated.[7] But these instances mark nothing more than an occasional and rare tolerance of the

336, per Brewer, J. "The firm is the contracting party, not the individuals composing the firm. The credit is given to the firm. The partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial person or being, distinct from the individuals composing it." Curtis v. Hollingshead, 14 N. J. Law, 403. Where some of the members of one firm were also members of another firm, and both firms assigned for the benefit of their creditors, a claim by one firm against the other might be proved against the debtor firm, since the two firms, notwithstanding the interest of said partners in both, were separate entities as to their respective creditors. In re Haines & Co.'s Estate (Pa. Sup.) 35 Atl. 237; Appeal of Grove, Id. See, also, Faulkner v. Hyman, 142 Mass. 53, 6 N. E. 846; Fitzgerald v. Grimmell, 64 Iowa, 261, 20 N. W. 179; Bracken v. Dillon, 64 Ga. 243; Meily v. Wood, 71 Pa. St. 488. "In most other cases where the partnership is spoken of as a separate legal entity, having its own property, creditors, and the like, little more is meant by the legal proposition than that the partners, as such, have special rights and liabilities, which are worked out through their partnership relation." Mechem, Partn. § 4, citing Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972; Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473. On a note executed by a firm and an individual jointly, as between themselves, each is liable for one-half the debt, i. e. the firm is treated as one person. See Hosmer v. Burke, 26 Iowa, 353; Chaffee v. Jones, 19 Pick. (Mass.) 260; Warner v. Smith, 1 De Gex, J. & S. 337.

[5] See post, p. 392; Pom. Code Rem. § 121.

[6] Pol. Partn. art. 11, p. 19; Id. art. 63, p. 118.

[7] See cases cited supra, note 4. "The tendency of legislation and the decision is in the direction of recognizing the character of a firm as an entity. Statutes permit co-partnerships to sue and be sued by the firm name. Property of the co-partnership is assessed as that of the firm, instead of as that of the individual members. Decisions permit chattel mortgages executed by a partnership to be filed at the place of its principal business." Paige, Cas. Partn. p. 111, note, citing Minn. St. 1878, c. 66, § 42 (Rev. St. 1894, § 5177); Hubbardston Lumber Co. v. Covert, 35 Mich. 255.

mercantile character given the firm; for otherwise, whether the case involves property, or debts or credits, or anything else pertaining to a partnership, the law looks on the matter as affecting the members of the partnership,—having them in view always, to the exclusion of the firm as a thing of itself.[8]

Effect of Changes in the Membership of a Partnership According to the Different Aspects.

An evidence of the disposition of the common law to deny all countenance to a firm, apart from its component members, is the fact that the death of a partner, or his retirement from the firm, destroys the latter's existence, and that so, also, does the marriage of a feme sole partner.[9] In case of the happening of either of these events, the partners in whom the business remains would, looking at the situation in the commercial aspect, regard the firm as continuing, having merely lost a member. The introduction of a new person into the business as a partner would also, by law, effect a termination of the partnership, while in commercial phrase it would be said that the firm had merely increased its membership.[10] The business may be conducted, of course, still, by the remaining members, in the one case, and by the partners, augmented as suggested, in the other; but in either case it is regarded in law as another partnership entirely, by which the business is conducted after the change.

[8] Bates, Partn. §§ 170, 171. See Ex parte Beauchamp [1894] 1 Q. B. 1; Chambers v. Sloan, 19 Ga. 84; Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40. In Jones v. Blun, 145 N. Y. 333, 39 N. E. 954, it was held that under a statute prohibiting transfers by a corporation which has refused payment of any note, directly or indirectly, to any stockholder, a transfer to a partnership, one member only of which is a stockholder, is invalid. The court said: "It has been often pointed out that a partnership cannot properly be regarded as a legal entity, separate and distinct from the several partners therein. For certain purposes, this fiction may be very properly indulged. In keeping partnership accounts, and in marshaling the assets of an insolvent or liquidating firm, this is constantly done. It cannot be invoked, however, to shield the individual partner, in a case like the one at bar, from the effect of a statute forbidding a preference, or to enable him to do as a partner that which the law prohibits him from doing as an individual." In Harris v. Visscher, 57 Ga. 229, 232, the court said: "Partnership is but a relation; it is not a person; it is not a legal being. The real owners of partnership property are the partners." See, also, Bates, Partn. § 174.

[9] See post, p. 396.

[10] Lindl. Partn. p. 110.

A change in the name of the firm has no such legal effect, if the membership is not in any wise altered; but any change in the membership puts an end to the legal existence of the firm, and all expressions tending to a contrary understanding are mere figures of speech. Any act by which a firm is to be either bound or benefited affects merely the partners component of the firm at the time contemplated by the act.[11] Thus, a change in the firm's membership discharges a guarantor or surety for the firm as to any matter occurring after the change,[12] unless, of course, such change was contemplated by the person to be charged.[13] To make the obligation of such person continue, and, indeed, to bind, in any case, third persons, after the membership of the firm has changed, it must be shown that the third persons acquiesced in the change;[14] and even then it would be more correct to say that they obligated themselves for the successors of the firm as well as for the firm itself. Such a liability would cease, also, upon the partnership changing into a corporation.[15] A legacy left to a firm is payable to the individuals composing the firm at the time the legacy vests;[16] and a legacy left to the representatives of an old firm is payable to the executor of its last-surviving partner, rather than to the successors of the firm.[17] The authority given to trustees to lend money to a particular firm fails upon the death or retirement of any mem-

11 Lindl. Partn. p. 112. When a firm is spoken of by its name or style, evidence is admissible to show who, in fact, constituted the firm at the time in question. Carruthers v. Sheddon, 6 Taunt. 15; Bass v. Olive, 4 Maule & S. 13; Stubbs v. Sargon, 2 Keen, 255, 3 Mylne & C. 507.

12 Bellairs v. Ebsworth, 3 Camp. 53; University of Cambridge v. Baldwin, 5 Mees. & W. 580; Simson v. Cooke, 1 Bing. 452. As to sureties to the firm, see Holland v. Teed, 7 Hare, 50; Strange v. Lee, 3 East, 484; Weston v. Barton, 4 Taunt. 673; Simson v. Cooke, 1 Bing. 452; Myers v. Edge, 7 Term R. 254; Dry v. Davy, 10 Adol. & E. 30; Wright v. Russel, 2 W. Bl. 934. See, generally, as to sureties, White Sewing-Mach. Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Equitable Life Assur. Soc. v. Coats, 44 Mich. 260, 6 N. W. 648; Palmer v. Bagg, 56 N. Y. 523; Parham Sewing-Mach. Co. v. Brock, 113 Mass. 194.

13 See Lindl. Partn. p. 117; Pease v. Hirst, 10 Barn. & C. 122; Metcalf v. Bruin, 12 East, 400, 2 Camp. 422.

14 Backhouse v. Hall, 6 Best & S. 507.

15 Lindl. Partn. p. 118; Dance v. Girdler, 1 Bos. & P. (N. R.) 34.

16 Stubbs v. Sargon, 2 Keen, 255.

17 Leak v. MacDowall, 3 New Reports, 185.

ber of the firm.[18] An authority to insure in their names, given to two partners, does not authorize insurance in the names of such partners and another subsequently entering the firm.[19] An employment of one by a partnership under a contract for a term expires upon the death or retirement of a partner, notwithstanding that the term specified has not yet expired.[20] A firm, as such, appointed to an office, holds the same only in the persons of its partners as of the time of the appointment.[21] Collaterals left with a banking firm to secure advances prima facie do not cover subsequent advances made after a change in the firm membership.[22] In the case, too, of a deposit of collaterals by one partner to secure advances to his firm, the collaterals cannot be held as security for advances made after his death.[23] It must be remarked, however, that, notwithstanding the inaccuracy of the expressions in vogue with merchants in this connection, it is difficult to see how the subject of partnership could be discussed without using them. Hence they will be found employed in this treatise, and elsewhere, in default of other expressions more in consonance with law.[24]

[18] Fowler v. Reynal, 2 De Gex & S. 749.

[19] Barron v. Fitzgerald, 6 Bing. N. C. 201.

[20] Tasker v. Shepherd, 6 Hurl. & N. 575; Burnet v. Hope, 9 Ont. 10.

[21] De Mazar v. Pybus, 4 Ves. 644. See Lindl. Partn. p. 114; Barron v. Fitzgerald, 6 Bing. N. C. 201; Hole v. Bradbury, 12 Ch. Div. 886; Stevens v. Benning, 1 Kay & J. 168.

[22] Lindl. Partn. p. 119; Ex parte Kensington, 2 Ves. & B. 83, per Lord Eldon.

[23] Bank of Scotland v. Christie, 8 Clark & F. 214.

[24] Sir George Jessel in Pooley v. Driver, 5 Ch. Div. 460. "Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners,—a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But, when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm." Id. 476.

PARTNERSHIP NAME.

36. A partnership name is not essential, but is convenient. The business of a firm may be carried on under any name which the partners think fit to adopt, except

EXCEPTION—(a) A name distinctly purporting to be a corporate name cannot be adopted.

(b) Where a particular name under which a business is carried on by any person, firm, or company has become associated with and appropriated to that business, no other person may carry on a like business under the same name, or a name only colorably differing therefrom, in a manner calculated to deceive customers by leading them to believe that they are dealing with such person, firm, or company as first mentioned.

(c) By statute, in some states, the name of one not a partner cannot be used, and the suffix "and Company" must represent an actual partner.

Necessity of Firm Name.

For convenience a firm usually adopts a name by which it shall be known, and under which it transacts its business. It does not always do so, and it is not essential that it shall.[25] For instance, where the law has charged liability, and the parties have claimed that no partnership existed, it may readily be seen how there would be none. Such an instance alone shows that it is not incumbent on a partnership to have a name. A partnership may always act in the individual names of the partners. But it may also act in the firm name. It need not invariably pursue either course, but may sometimes use its firm name, and sometimes the names of its members.[26] When any other than the firm name is used, all the part-

[25] Bates, Partn. § 191; Ontario Bank v. Hennessey, 48 N. Y. 545; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Haskins v. D'Este, 133 Mass. 356; Getchell v. Foster, 106 Mass. 42; Kitner v. Whitlock, 88 Ill. 513; Le Roy v. Johnson, 2 Pet. 186.

[26] See McGregor v. Cleveland, 5 Wend. (N. Y.) 477; Berkshire Woolen Co. v. Juillard, 75 N. Y. 535; Patch v. Wheatland, 8 Allen (Mass.) 102; Holden v.

ners must concur, because one partner has no power to bind the firm in any other than the adopted name.[27]

Bloxum, 35 Miss. 381; Ex parte Nason, 70 Me. 363; Ex parte First Nat. Bank of Portland, Id. 369; Norton v. Seymour, 3 C. B. 792; Dudley v. Littlefield, 21 Me. 418; Mick v. Howard, 1 Ind. 250; McConeghy v. Kirk, 68 Pa. St. 200; McCauley v. Gordon, 64 Ga. 221; Finch v. De Forest, 16 Conn. 445. But where the partners execute a note in their individual names, for a purpose foreign to the partnership business, the note is an individual, not a firm, debt. Forsyth v. Woods, 11 Wall. 484; Lill v. Egan, 89 Ill. 609; Pahlman v. Taylor, 75 Ill. 629; Burns v. Mason, 11 Mo. 469. A signature by one of a firm in his name "& Co." is good to bind the other partners, though the firm has been always known by the name of another partner "& Co.," unless it be shown that there is such a distinct house as that by the style of which the bill or note is subscribed. Drake v. Elwyn, 1 Caines (N. Y.) 184. A partnership may bind itself by its signature to an undertaking in attachment, either by the name of the firm simply, or by the signatures of the individual members of the firm, provided it appears in the instrument that the intention is to bind the partnership. Grollman v. Lipsitz, 43 S. C. 329, 21 S. E. 272. The consent of one partner to a firm contract is the consent of the firm. Jurgens v. Ittmann, 47 La. Ann. 367, 16 South. 952. A firm may have several names, and, if so, it is bound by a contract executed in either. Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Michael v. Workman, 5 W. Va. 391; Hunt v. Semonin, 70 Ky. 270. The description of the defendants as partners, under a particular name or firm, in the writ, is not an averment that they promised by that name. Proof of a promise by another name, therefore, is not a variance. Brown v. Jewett, 18 N. H. 230. See, also, Miner v. Downer, 20 Vt. 461, 466, where, in an action against S. & W. D. & Co., a recovery was had upon a note signed "D. & D." The court said: "The present rule of law is, we apprehend, that if one execute a bill, note, or other writing by an assumed name, or an alias dictus, he may, nevertheless, be made liable upon the note, or the note may be wholly disregarded if it be fatally defective (which we think this is not), and a recovery be had upon a count for the consideration."

[27] Palmer v. Stephens, 1 Denio (N. Y.) 471; Kirby v. Hewitt, 26 Barb. (N. Y.) 607; Gordon v. Bankard, 37 Ill. 147; Heenan v. Nash, 8 Minn. 407 (Gil. 363); Tilford v. Ramsey, 37 Mo. 563; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Kirk v. Blurton, 9 Mees. & W. 284; Royal Canadian Bank v. Wilson, 24 U. C. C. P. 362. See Haskell v. Champion, 30 Mo. 136. "This is the whole significance of the firm name. It is a name which the partners adopted, by which each could, in certain matters, bind the other with himself, or another agent might bind both." Haskins v. D'Este, 133 Mass. 356, 357. See, also, Wright v. Hooker, 10 N. Y. 51. Firm is bound by acceptance in an agent's name, which it has adopted as a firm name; but, if it appears that the agent was also doing business on his own account, it must be shown that he accepted the bill on account of the partnership, in order to bind it. Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402. In Norton v. Seymour, 3 C. B. 792, 794, Maule, J., said: "I should hesitate to say that one of two partners could not bind the other by signing the

What Name may be Used.

Generally speaking, every man is free to call himself by what name he chooses, or by different names for different purposes, so long as he does not use this liberty as a means of fraud, or of interfering with substantial rights of his fellow citizens. And this principle extends to commercial transactions as well as to other affairs of life.[28] "Individuals may carry on business under any name and style they may choose to adopt." [29] The style of the firm need not, and often does not, express the name of any actual member of the firm. It may contain, and often does contain, names other than those of the actual partner, and it may express no individual names at all.[30] On the other hand, although no man is to be pre-

true names of both, instead of the fictitious name." This seems to be the law where the firm has received the benefit of the consideration, or where the firm has no name. Bates, Partn. § 200; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Getchell v. Foster, 106 Mass. 42; Patch v. Wheatland, 8 Allen (Mass.) 102; Kitner v. Whitlock, 88 Ill. 513; Crozier v. Kirker, 4 Tex. 252; Richardson v. Huggins, 23 N. H. 106; Crouch v. Bowman, 3 Humph. (Tenn.) 209; Iddings v. Pierson, 100 Ind. 418. Where there is no firm name, the names of all the partners need not be used to bind the firm. Bates, Partn. § 201. The firm is bound, though a partner uses his own name alone, Sage v. Sherman, 2 N. Y. 417 (but see Uhler v. Browning, 28 N. J. Law, 79; Dreyer v. Sander, 48 Mo. 400; Clark v. Houghton, 12 Gray [Mass.] 38); or his own name with the suffix "& Co.," Drake v. Elwyn, 1 Caines, 184; Brown v. Pickard, 4 Utah, 292, 9 Pac. 573, and 11 Pac. 512; Austin v. Williams, 2 Ohio, 61; Crary v. Williams, Id. 65; or a fictitious name, Holland v. Long, 57 Ga. 36. As to immaterial variation from true name, see Bates, Partn. § 202.

[28] "A partnership can exist without a firm name even when there are articles; but the great convenience makes a name almost a necessity, and, in the absence of statute provisions, there seems to be absolutely no restriction in the choice or change of a name, which may be the individual name of one or more members, or of all, or a mere creation of the fancy; and there may be several names, or two firms may constitute a new firm, without adopting a new name; or, again, two firms composed in part of the same persons may adopt the same name." Lindl. Partn. (Wentw. Ed.) p. 112, note 1, citing, inter alia, Wright v. Hooker, 10 N. Y. 51; Ontario Bank v. Hennessey, 48 N. Y. 545; Crocker v. Colwell, 46 N. Y. 212; Mershon v. Hobensack, 22 N. J. Law, 372; Kitner v. Whitlock, 88 Ill. 514; Ottoman Cahvey Co. v. Dane, 95 Ill. 203; Lill v. Egan, 89 Ill. 609; Haskins v. D'Este, 133 Mass. 356; U. S. Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791. And see, generally, cases cited supra.

[29] Maugham v. Sharpe, 17 C. B. (N. S.), at page 462.

[30] One person, or an association of persons, may do business under a firm name entirely distinct from the name or names of the person or persons composing the firm. Shain v. Du Jardin (Cal.) 38 Pac. 529.

vented from carrying on any lawful business in his own name by the mere fact of his name and business being like another's,[31] yet the mere fact of the name itself being his own does not give him any right or license to use it with such additions, and in such a connection, as to deceive outside persons, and make them believe they are dealing with some one else.[32]

It is provided by statute in some of the United States that no person shall do business in the name of one not a partner,[33] and that the designation "and Company," or "& Co.," shall represent an actual partner or partners.[34] These statutes are penal, and their purpose is to prevent fraud; a person being forbidden to induce a false credit on the strength of an unauthorized name.[35] They cannot be invoked by a debtor, however, to avoid the payment of a debt to a creditor offending against them.[36] One effect of these statutes is to preclude, where they are in force, the use of an old, established firm name by a successor only in respect of interest in the old firm, who carries on business in the same line; their effect being to make a rule contrary to that prevailing in England and most of the United States, where the firm name has been held to be an asset of the business, and even to pass by a sale of the good will.[37] For a trade name which has become well known in a

[31] Burgess v. Burgess, 3 De Gex, M. & G. 896. See Williams v. Farrand, 88 Mich. 473, 50 N. W. 446; Meneely v. Meneely, 62 N. Y. 427; Russia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304.

[32] Pol. Partn. art. 11; Holloway v. Holloway, 13 Beav. 209; Bininger v. Clark, 60 Barb. (N. Y.) 113.

[33] Louisiana: Voorhies' Rev. Laws 1884, § 2668. Georgia: Code 1882, § 1897. In New York the above rule does not apply to partnerships located or doing business in other countries. Laws 1849, c. 347; 3 Rev. St. (9th Ed.) p. 2137; Stim. Am. St. Law, § 5305.

[34] Louisiana: Voorhies' Rev. Laws 1884, § 2668; Stim. Am. St. Law, § 5305.

[35] Wood v. Railway Co., 72 N. Y. 198; Zimmerman v. Erhard, 83 N. Y. 76; Kent v. Mojonier, 36 La. Ann. 259.

[36] Wood v. Railway Co., supra; Wolfe v. Joubert, 45 La. Ann. 1100, 13 South. 806; Kent v. Mojonier, 36 La. Ann. 259; Adams v. Adams, 7 Abb. N. C. (N. Y.) 292; Thompson v. Gray, 11 Daly (N. Y.) 183. Pen. Code, § 363, declaring guilty of a misdemeanor one who transacts business, using the designation "& Company," when he has no partner, does not preclude one so carrying on business under such a firm name from recovering the amount of a credit which he gives in connection with the business. Kennedy v. Budd, 5 App. Div. 140, 39 N. Y. Supp. 81.

[37] Levy v. Walker, 10 Ch. Div. 436; Frazer v. Lubricator Co., 121 Ill. 147, 13

locality for many years as identified with a particular business attracts a confidence which a name newly adopted has yet to earn. There are few persons who cannot recall trade designations that have descended from one generation to another, and, in cases of successions to a business, sometimes all the persons trading bear names not occurring in the designation at all.

In the selection of a name to designate a partnership, it is well to avoid one importing a corporation. In some of the United States the selection of such a name is prohibited by statute, the prohibition being enforced by fine.[38] According to Pollock, such a selection would probably be unlawful, also, in England, although he seems uncertain as to the method that would be employed there to prevent it.[39] He suggests that the word "Company," inasmuch as it is, by common usage, applicable to unincorporated associations as well as corporations, would not, perhaps, be covered by such a restriction.[40]

The name should not include that of any but general partners, but the effect of indifference to this rule would be merely to render the special partner whose name appears liable for firm debts as if he was a general partner. This would not be the result, under the laws of some of the states, if the word "Limited" followed

N. E. 639. Further, as to the construction and effect of this class of statutes, see Gay v. Seibold, 97 N. Y. 472; Sparrow v. Kohn, 109 Pa. St. 359, 2 Atl. 498. In Mississippi, if a partnership business is conducted in the name of one partner, without the addition of the words "& Co.," the partnership property is treated as his individual property, so far as his individual creditors are concerned. Gumbel v. Koon, 59 Miss. 264. See Stim. Am. St. Law, § 5305, for statutory provisions regulating use of firm name. "& Co." creates a prima facie presumption of an unnamed partner. Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427. Contra, in the absence of such a statute, Robinson v. Magarity, 28 Ill. 423; Brennan v. Pardridge, 67 Mich. 449, 35 N. W. 85. And see Fulton v. Maccracken, 18 Md. 528, 544.

[38] Illinois: 1 Starr & C. Ann. St. 1896, p. 1332, c. 38, § 220; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339. Where persons associate themselves together and carry on business under a common name, and the association is not a corporation, they may be regarded as partners, whatever name they have adopted. Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928. The business of a partnership may be carried on under any name which the partners adopt, though it be one in form appropriate for a corporation. Holbrook v. Insurance Co., 25 Minn. 229; Crawford v. Collins, 45 Barb. (N. Y.) 269.

[39] Pol. Partn. art. 11. [40] Id.

the proper name or names in the firm designation used in the transaction of the firm's business.[41]

Exclusive Right to Name.

A partnership name once adopted is, after the firm has become identified with it, jealously guarded by the firm against the aggressions of other persons or firms in the same line of business who might seek to assume and maintain the use of the same name, or a similar one. This is no question peculiar to partnership, however, for the right of defense against such aggressions pertains to individuals as well. To say that a man or a firm has a property in a name would not, in all cases, be correct, although sometimes, as against certain individuals, there might be such a property, the reference here being particularly to the case of the sale of the good will of a business, which sale would carry the seller's right to the use of the trade name; and the use of the name thereafter would be assured to the purchaser as against the seller. There is a property in a trade mark, by which a firm or person designates or symbolizes some proprietory article manufactured and kept for sale, but there is not such a general property in a name under which business is carried on in the usual course.[42] In Levy v. Walker [43] the court asked, "Is there any authority showing that a man has such a property in his name that he can prevent another person from using it, when the principle of trade mark does not come in?" And, answering his own question, the court added, "A man can assume what name he pleases." The security of a firm in the possession of the name it has adopted lies altogether in its right to seek the intervention of equity to prevent fraud. This security does not depend upon any exclusive right which the firm may be supposed to have to a particular name, or to a particular form of words. The right is to be protected against fraud; and fraud may be practiced by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not use it under circumstances such as to effect a fraud upon others.[44] And it seems that the law will thus protect against, not actual fraud only (that is, fraud intentionally committed), but against constructive fraud as well; that is, it will prevent a man from so carrying on business as,

[41] See post, p. 445. [42] Lindl. Partn. p. 114. [43] 10 Ch. Div. 436, 445.
[44] Croft v. Day, 7 Beav. 84; Frazer v. Lubricator Co., 121 Ill. 147, 13 N. E. 639.

knowingly or not, to let it appear that his business is the business of another man. "And it might happen that the mere use of a well-known fancy name would be evidence of an intention on the part of the person using it to commit a fraud." [45]

Same—Corporation Infringing Trade Name—Remedy.

The person or firm aggrieved by the fraudulent use of a name can seek redress against offending corporations as well as against offending individuals or firms.[46] Doubt once existed as to whether, in such a case, the remedy would lie against the corporation, rather than the persons who procured it to assume the name, the ground of the doubt being that the corporation has power to trade only under the name by which it came into existence.[47] The answer to this is, however, that there is no obligation upon the corporation to trade at all, and the aggrieved party must not be required to suffer merely because it would embarrass the offender if relief were given.[48]

Same—No Trade Name without Actual Business.

It is perhaps unnecessary to say that no one will be secure in the possession of a trade name unless appropriated in connection with an actual, existing business.[49] In other words, no one may effectively appropriate a trade name in the vague anticipation of doing business under it sometime in the future.

What may be Done in Firm Name.

When a partnership has adopted a firm name, all its business should be transacted in such name. Indeed, as will be seen, a partner ordinarily has no power to bind the firm by contracts made in any other name.[50] Whatever is done by the members of a partnership under their firm name is, with an exception presently to be noted, as valid as if done in the real names of the partners.[51] The

[45] Merchant Banking Co. of London v. Merchants' Joint Stock Bank, 9 Ch. Div. 560, 563.

[46] Pol. Partn. art. 11, p. 18.

[47] Lawson v. Bank, 18 C. B. 84, 25 Law J. C. P. 188.

[48] Pol. Partn. art. 11, p. 18.

[49] Lawson v. Bank, supra; Pol. Partn. art. 11, p. 18.

[50] See ante, note 27.

[51] Hendren v. Wing, 60 Ark. 561, 31 S. W. 149. Personal property may be mortgaged, as well as sold, to a partnership, in the firm name, without the use of the name of any of the partners. Hendren v. Wing, 60 Ark. 561, 31 S. W. 149.

firm name is merely a convenient abbreviation or symbol of the individual names.[52] The use of a firm name, however, raises a prima facie presumption that a partnership exists,[53] and that the act is a partnership transaction.[54]

Conveyances of real property cannot be made by or to a partnership in the firm name, but must be made in the individual names of the partners. A conveyance in the firm name, however, will pass an equitable title; and, if the real names of one or more of the partners appear in the firm name, a conveyance to the firm in the name of the firm will vest the legal title in the partners whose names appear, and they will hold it in trust for all the partners.[55]

In the absence of statute, actions cannot be maintained by or against a partnership in the firm name.[56]

[52] Bates, Partn. § 191.

[53] Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427; Bishop v. Hall, 9 Gray (Mass.) 430. But see Robinson v. Magarity, 28 Ill. 423; Chinic v. Gervais, 2 Low. Can. Rev. de Leg. 334, K. B.

[54] Haskins v. D'Este, 133 Mass. 356; Baring v. Crafts, 9 Metc. (Mass.) 380; Ferris v. Thaw, 5 Mo. App. 279.

[55] Menage v. Burke, 43 Minn. 211, 45 N. W. 155; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056; Winter v. Stock, 29 Cal. 408; Moreau v. Saffarans, 3 Sneed (Tenn.) 595. "The legal title to real estate can be held only by a person or a corporate entity which is deemed such in law; and therefore a partnership cannot, as such, take and hold such legal title." Gille v. Hunt, 35 Minn. 357, 29 N. W. 2. In Tidd v. Rines, 26 Minn. 201, 2 N. W. 497, it was decided that a conveyance to a partnership by its firm name did not vest in it any legal title or estate, because a partnership, as such, is not recognized in law as a person, so that, even had it been stated in the mortgage that the name inserted as the mortgagee was that of a partnership, it would not have made the partnership a mortgagee. Nor would the individual partners other than the one named be the mortgagee. "Where the style of a partnership is inserted as grantee, and it contains the name or names of one or more of the partners, there is no reason why the title should not vest in the partners so named, and the authorities are to the effect that it would." Gille v. Hunt, 35 Minn. 357, 29 N. W. 2. See, also, Morrison v. Mendenhall, 18 Minn. 232 (Gil. 212); Reed v. Railroad Co., 105 Mass. 303; Lippincott v. Carriage Co., 25 Fed. 577.

[56] See post, p. 392.

PARTNERSHIP PROPERTY.

37. Partnership property, in its largest sense, embraces everything that the firm owns, consisting of both

(a) The capital contributed by its members, and

(b) The property subsequently acquired in partnership transactions.

38. The term "partnership property" is sometimes used, in a narrower sense, to designate what the firm owns, other than its capital.

During the continuance of a firm, the capital contributed by its members is not distinguishable from other property acquired in partnership transactions. All alike constitutes partnership property or assets, and is treated alike in the administration of the partnership affairs. Third persons are not concerned with the origin of the firm's title. In treating of the general characteristics, therefore, of partnership property, it is impossible to distinguish between the capital and the other property of the partnership. As between themselves, however, under the partnership agreement, the partners have certain rights, and are under certain liabilities, with respect to the partnership capital. It will be convenient to first discuss these rights and liabilities separately, and then to take up the subject of partnership property in general.

PARTNERSHIP CAPITAL.

39. The capital of a partnership is the aggregate of the sums contributed by its members to establish or continue the partnership business.[57]

The "capital" is, under the agreement of partnership, invariable; and in this respect the force of the expression differs widely from

[57] See Dean v. Dean, 54 Wis. 23, 11 N. W. 239; Cf. Thomas v. Lines, 83 N. C. 191. See, also, Sexton v. Lamb, 27 Kan. 426; Nutting v. Ashcroft, 101 Mass. 300; Mather's Ex'r v. Patterson, 33 Pa. St. 485. Where a former clerk is taken into co-partnership by a firm which was indebted to him, and the amount of such indebtedness is placed to his credit upon the new books, to which, on dissolution of the firm, is added his share of the net profits, such indebtedness will

that of the other expression, "the firm's property or assets"; for the latter fluctuates according to the fortunes of the business.[58] The capital is in some cases (notably, in the cases of professional and mechanical partnerships) a matter of nominal contribution merely, unless we choose to say, rather, that in some cases the capital is in profits, which is a confusing expression.

SAME—CONTRIBUTIONS OTHER THAN IN MONEY.

40. A partner's contribution to the firm's capital need not be in money, but may consist of anything else of value.

It is not necessary, in order to have the contribution to a firm's capital perfectly valid, that such contribution shall be in money in all cases; for, by agreement, the contribution, although stated in terms of money, may be (except in the case of a special partner's contribution) in the form of securities, a patent, the good will of a business, or anything else which is apparently readily convertible into money.[59] It must come into the fund, however, free from liens and incumbrances generally, to the extent of the contribution; and any expenditure upon the property necessary, in order to make the amount agreed to be contributed good, is chargeable to the partner contributing the property.[60]

SAME—PARTNERS' RIGHTS AS TO CAPITAL.

41. The capital belongs to the partners collectively, or as a firm; but upon dissolution it resolves itself again into individual property, in the original several proportions.

not be regarded as capital put in by such new member, but rather as a loan to the firm, to be repaid him with his share of the profits. Topping v. Paddock, 92 Ill. 92. See, also, Stafford v. Fargo, 35 Ill. 481. A premium paid for admission to another's business is the latter's individual property, and not a contribution to capital. Evans v. Hanson, 42 Ill. 234; Ball v. Farley, 81 Ala. 288, 1 South. 253.

[58] Lindl. Partn. p. 320.

[59] Bates, Partn. § 253.

[60] Bates, Partn. § 254; Dunnell v. Henderson, 23 N. J. Eq. 174. See, also, Sexton v. Lamb, 27 Kan. 426; Nichol v. Stewart, 36 Ark. 612.

42. In the absence of anything showing a contrary intention, the rights of all the partners in the capital are presumed to be equal.

The capital being once made up of these contributions, whether of money or anything other than money, it cannot be said, technically, that any individual partner is the owner of any part of it; and this fact involves one of the phases of partnership where it is most convenient to assume the existence of a distinction between the firm, as an entity, and the partners who compose it. The capital belongs to the firm.[61] Upon the dissolution of the firm and the payment of its debts, the capital resolves itself back into individual property, in the original several proportions;[62] but during the firm's existence the individual partner's right to any part of it exists only in respect of the fact that he is one of those who compose the partnership that owns it.

Presumption of Equality—Contribution of Services.

In the absence of anything showing a contrary intention, the rights of all the partners in the capital are presumed to be equal. But this presumption may be rebutted.[63] It only applies where a partnership is merely proved to exist, and there is nothing to show what are the shares of the respective parties.[64] When the amount of each partner's contribution is shown, there is no room for presumptions, and upon a dissolution each partner must be repaid the amount contributed by him, before there is any distribution of profits.[65] In many cases a partner contributes no money or prop-

61 Lindl. Partn. p. 323; Bates, Partn. § 256; Clark's Appeal, 72 Pa. St. 142; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629; Roberts v. McCarty, 9 Ind. 16; Huston v. Neil, 41 Ind. 504; Hiscock v. Phelps, 49 N. Y. 97; Person v. Wilson, 25 Minn. 89; Shea v. Donahue, 15 Lea (Tenn.) 160. "But where, as is usual in an ordinary mercantile partnership, a partnership is created, not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter." Whitcomb v. Converse, 119 Mass. 38, 43.

62 Shea v. Donahue, 15 Lea (Tenn.) 160; Whitcomb v. Converse, 119 Mass. 38. See, also, post, p. 415.

63 Jackson v. Crapp, 32 Ind. 422, 429.

64 Id.

65 Livingston v. Blanchard, 130 Mass. 341; Whitcomb v. Converse, 119 Mass. 38; Shea v. Donahue, 15 Lea (Tenn.) 160; Taylor v. Coffing, 18 Ill. 422; Raymond v. Putnam, 44 N. H. 160; Marquand v. Manufacturing Co., 17 Johns. (N.

erty, his equivalent being services, or something else at the time altogether intangible. In such a case the partner contributing only services is not entitled, on dissolution, to any part of the original capital.[66] In other words, partners who have contributed unequally to the capital stock are, upon dissolution, entitled to share in the capital stock, not equally, but in the proportion to the amounts contributed by them respectively thereto.[67] If this were not the rule, it would be possible for a partner who contributed little or nothing to make a large profit, at the expense of his co-partner, by simply dissolving the partnership as soon as it was formed, and before either profits or losses were made. This would be the result if one of the partners should die immediately after the formation of the firm. Such an intention must be clearly shown. The contract will not be so construed unless its terms require it.

Losses Impairing Capital.

Where the business has resulted in a loss impairing the capital, such loss is prima facie to be equally borne, notwithstanding the fact that the capital was unequally contributed.[68] Thus, in Whitcomb v. Converse,[69] the articles of partnership provided that A. and B. should contribute the whole capital in unequal proportions; that B., C., and D. should contribute all their time to the business,

Y.) 525; Conroy v. Campbell, 45 N. Y. Super. Ct. 326. Where, in an action to settle a partnership, the evidence merely shows that one of the partners contributed the capital and the other the labor and skill, a finding that the agreement in case of a dissolution was that the party furnishing the capital should first be repaid the amount, and only the remainder divided between the partners, would be warranted. Washington v. Washington (Tex. Civ. App.) 31 S. W. 88. Upon a dissolution and settlement of a partnership, the amounts advanced individually for the joint business by each partner should be ascertained; and a balance allowed the one making the greatest advances of the excess of his advances over the advances of his co-partner, which excess is a lien on the partnership property; and on a sale by a master of such property, and the payment of such excess to the partner entitled thereto, the remainder should be divided between the partners according to their respective interests. Nims v. Nims, 23 Fla. 69, 1 South. 527.

[66] Shea v. Donahue, 15 Lea (Tenn.) 160.

[67] Jackson v. Crapp, 32 Ind. 422.

[68] Bates, Partn. § 813; Moley v. Brine, 120 Mass. 324; Sangston v. Hack, 52 Md. 173, 200; Jones v. Butler, 87 N. Y. 613; Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105; Taft v. Schwamb, 80 Ill. 289; Taylor v. Coffing, 18 Ill. 422, 428; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Carlisle v. Tenbrook, 57 Ind. 529.

[69] 119 Mass. 38.

and A. "such time as he may be able to give"; and that each should receive one-fourth of the net profits. The business resulted in a loss of a portion of the capital. It was held that the capital constituted a debt of the partnership, to which all the partners were bound to contribute equally. The fact that the partner contributing services loses them does not affect the question.[70] The doctrine here presented is sustained by the great weight of authority, though there are some contra cases.[71] Of course, the agreement of the parties determines the proportions in which losses are to be shared, and what losses are to be shared. But, prima facie, a loss of capital is like any other loss, and is to be borne in like proportions.[72]

SAME—ADVANCES BY PARTNER.

43. Advances to the firm by a partner in excess of his agreed contribution constitute a loan, and not capital.

Any advances of money to the firm by a partner in excess of his contribution agreed to be made in the contract do not come within the designation of capital; the same being nothing other than a loan to the partnership, whereby the loaner becomes a creditor of the firm, though, of course, not of equal standing with outside creditors in respect of payment in case of the firm's insolvency.[73]

[70] Bates, Partn. § 815.

[71] See Everly v. Durborrow, 8 Phila. (Pa.) 93; Cameron v. Watson, 10 Rich. Eq. (S. C.) 64 (but see comment on these two cases in Whitcomb v. Converse, 119 Mass. 38, 43); Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Yobe v. Barnet, 3 Watts & S. (Pa.) 81. Where partnership capital is supplied solely by one partner, the other giving time and labor, and the profits and losses are to be shared equally, interest first to be paid upon such capital before any division of profits, and such capital is to be repaid on dissolution by death of one partner, the partner giving labor and time is not liable to contribute to a loss on capital upon realization after the death of the other partner. (Wood v. Scoles, 1 Ch. App. 369, applied.) Aldridge v. Aldridge, 8 Reports, 189; Id. [1894] 2 Ch. 97.

[72] Bates, Partn. § 815.

[73] See post, p. 273 et seq.

SAME—LIMITATIONS AS TO CONTRIBUTIONS TO CAPITAL.

44. A partner cannot either increase or diminish his contribution except by a consent of all the members of the firm.

A partner cannot be required to contribute anything more than he has committed himself to in the agreement, no matter what the emergencies of the business may be, and no matter if the alternative is of necessity a dissolution of the partnership.[74] A partner cannot increase, of his own motion merely, his proportion of the capital;[75] and if he fails to draw out his profits annually, so that they accumulate in the hands of the firm, the accumulation, unless it is expressly agreed to that effect between all the partners, does not become incorporated in the capital.[76] Neither, except by agreement between all the partners, can the accumulation be regarded as a loan to the firm, for which interest can be demanded. What the partner has agreed to perform in the way of contribution to the capital he must perform, however, to the utmost, if necessary, and he has not the right to withdraw at any time during the existence of the partnership any part of his contribution.[77] To state the matter generally, a partner cannot either increase or diminish his contribution, except by consent of all the members of the firm, during the firm's continuance.[78] It is no such diminution if a partner agreeing to contribute property to a certain amount places with the firm property of a greater worth, and subsequently, upon its being reduced to money, takes back the surplus. But in a case where property thus placed with the partnership consisted of buildings, and these subsequently were burned down, and, at the expense of the partnership, were rebuilt at a cost greater than their original valuation, it was held that the property could not, at the

[74] Lindl. Partn. p. 321.

[75] Fulmer's Appeal, 90 Pa. St. 143; Cock v. Evans, 9 Yerg. (Tenn.) 287; Farmer v. Samuel, 4 Lit. (Ky.) 187.

[76] Dean v. Dean, 54 Wis. 23, 11 N. W. 239. See, also, Dumont v. Ruepprecht, 38 Ala. 175; Tutt v. Land, 50 Ga. 339. But see Raymond v. Putnam, 44 N. H. 160.

[77] Lindl. Partn. p. 321.

[78] Id. See Heslin v. Hay, L. R. 15 Ir. 431, and observations of Lord Bramwell in Bouch v. Sproule, 12 App. Cas. 405.

dissolution of the partnership, be recovered by the owner, upon his reimbursing the firm for its outlay, it having meantime enhanced largely in value. The original owner, having allowed the rebuilding to be done with the joint funds, had waived his right to withdraw the premises.[80] However, such property, thus coming within the ownership of the firm, would not be regarded as capital in excess of the individual's agreed contribution, but rather firm assets simply. It will be seen elsewhere that for money borrowed by a partner, to be contributed by him to the partnership capital as his proportionate part of it, the firm is not liable,[81] and the reason of this is easily to be gathered from what has been said above. The debt would be a personal one merely.

PARTNERSHIP PROPERTY IN GENERAL.

45. The agreement of the partners is the test of what is, and what is not, partnership property.

It is for the partners to determine by agreement among themselves what shall be the property of them all, and what shall be the separate property of some one or more of them. Moreover, it is competent for them, by agreement among themselves, to convert what is the joint property of all into the separate property of some one or more of them, and vice versâ. It is obvious, therefore, that the only true method of determining, as between the partners themselves, what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with.

SAME—WHAT CONSTITUTES.

46. The property of the firm consists, prima facie, of everything in its hands representing the contributions of the partners to the common stock, and the product thereof.

Unless it is shown to be otherwise, the firm property includes everything in the hands of the firm that was put into the common

80 Clark's Appeal, 72 Pa. St. 142. 81 See post, p. 229.

stock at the beginning of the partnership, or subsequently went into it as the result of the operations of the partnership, through the employment of either the firm property or the services of the partners.[82] If the partner contributed property to the firm, to become

[82] Lindl. Partn. p. 324. Property bought with money lent by the firm to one partner is not partnership property. Smith v. Smith, 5 Ves. 193. Whether land is partnership property or not is determined by the intention of the partners. Wilson v. Black, 164 Pa. St. 555, 30 Atl. 488. "That intention may be expressed in the deed conveying the land, or in the articles of partnership; but, when it is not so expressed, the circumstances usually relied upon to determine the question are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered upon the books of the firm. Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and in such case it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them or in a stranger. If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application." Robinson Bank v. Miller, 153 Ill. 244, 253, 38 N. E. 1078. See, also, Childs v. Pellett, 102 Mich. 558, 61 N. W. 54. Two partners bought land in their individual names, the first payment being made out of the proceeds of a note signed by each of them. An account describing the land was opened in the firm books, in which the purchase price of the land was debited, and the seller was credited with a like amount. The bank which discounted the note was charged with its proceeds, and the proceeds were credited to bills payable, with a memorandum that the contract of sale had been assigned to the bank as collateral security. Other payments on the purchase price to the seller were charged to him. Interest paid on deferred payments was charged to the land account. One of the partners was credited with traveling expenses incurred on a trip relating to the land. *Held*, that an intention to treat the land as firm property was shown. Where land is bought in the individual names of two partners and two other persons, under an agreement that each is to own a fixed undivided interest, and that, as between themselves, the liability of the buyers under the contract and on all notes given for purchase money shall be in proportion to the interest of each in the land, and that, if any of them should pay any money on behalf of any of the others, he should have a lien on the interest of the one for which the payment was made, and none of the firm money was used in the purchase, a strong presumption arises that the partners did not mean to treat the land as partnership property. Lindsay v. Race, 103 Mich. 28, 61 N. W. 271. Under Civ. Code, §§ 2401–2403, providing that property contributed by the partners shall be partnership property, the fact that they agree to retain the "title" in themselves separately is immaterial. Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048. An agreement in a partnership contract by one of the partners to contribute, as his capital to the business, certain land, "it

part of its stock, the firm owns it, and that not only as to its value at the time of the contribution; for any increase in value it may have developed since the contribution belongs to the firm, and not to the contributing partner.[83] Property, simply because bought and paid for by one partner out of his own funds, will not be presumed to belong to that partner, if it has been used and treated as property of the firm, for the presumption will be that he has contributed it to the common stock.[84] The good will of the business is partnership property.[85]

SAME—PROPERTY HABITUALLY IN USE OF FIRM.

47. Property habitually in the use of the firm is not necessarily partnership property.

The premises upon which the business is principally conducted are often the sole property of a partner, and so are often the tools of a trade, the furniture of an office, and even what is known as "stock in trade."[86] In the case of a partnership in profits merely,

being understood and agreed that said land is the sole property" of said partner, means the use of the land during the continuance of the partnership, and does not pass to the firm the equitable title to the land. (Dunbar, C. J., dissenting.) Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. Where an immovable is bought in the partnership name, or by one partner for the firm, the partners become joint owners. Calder v. Creditors, 47 La. Ann. 346, 16 South. 852.

[83] See ante, p. 114; Robinson v. Ashton, L. R. 20 Eq. 25. The enhancement in value of a contribution during the partnership inures to the firm which is also chargeable with any depreciation. J. Pars. Partn. § 28.

[84] Ex parte Hare, 1 Deac. 16, 2 Mont. & A. Bankr. 478; Lindl. Partn. p. 325; Bates, Partn. § 262. See, also, generally, Traphagen v. Burt, 67 N. Y. 30; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Davis v. Davis, 60 Miss. 615.

[85] Lindl. Partn. p. 327.

[86] Lindl. Partn. p. 328; Burdon v. Barkus, 3 Giff. 412, 4 De Gex, F. & J. 42; Ex parte Owen, 4 De Gex & S. 351; Ex parte Smith, 3 Madd. 63. Partners may stipulate that the ownership of property may remain in one while the firm could have only the use of it. Where articles of partnership provide that one partner is to put into the capital stock a building, machinery valued at $9,650, and the other two to put in $2,500, making a total capital stock of $12,119, and to pay the other interest on the excess put in by him, each partner will have a joint ownership of the building and machinery. Taft v. Schwamb, 80 Ill. 289. Blanchard v. Coolidge, 22 Pick. (Mass.) 151; Howe v. Howe, 99 Mass. 71; Bowker v. Gleason (N. J. Ch.) 7 Atl. 885; Moody v. Rathburn, 7 Minn. 89 (Gil. 58); Bartlett v. Jones, 2 Strob. (S. C.) 471.

there is no community of ownership in the property out of which the profits are produced.[87] In the absence of express agreement, the test by which to determine finally whether property is firm or separate is its status with reference to the business of the firm,—that is, how it was brought into the business, and for what purpose, as well as how it is treated by the parties in their firm operations,[88]—the bearing of which expression is illustrated by the two cases

[87] Pearce v. Pearce, 77 Ill. 284; King v. Hamilton, 16 Ill. 190; Flagg v. Stowe, 85 Ill. 164; Chase v. Barrett, 4 Paige (N. Y.) 148; Champion v. Bostwick, 18 Wend. (N. Y.) 175; Berthold v. Goldsmith, 24 How. 536; London Assur. Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442; French v. Styring, 2 C. B. (N. S.) 357; Fromont v. Coupland, 2 Bing. 170; Cf. Dwinel v. Stone, 30 Me. 384.

[88] Lindl. Partn. p. 329. Under a partnership agreement which requires one of the partners to "furnish for the use of the copartnership, during its continuance, all necessary teams, * * * in conducting the business," teams owned by such member, and applied by him to the use of the firm, do not become partnership property. Van Voorhis v. Webster, 85 Hun, 591, 33 N. Y. Supp. 121. On an issue whether certain mill property was partnership property, it appeared that the partnership was a milling concern, to form which the partners contributed equally, and had existed prior to the purchase of an undivided half interest in the premises by one partner of the other; that the property was taxed in the firm name, and that repairs and new machinery for the mill were paid for out of the firm bank account; and that the firm had sole use and possession of the property, and outside of it had but few assets. *Held*, that the premises were partnership property. Booher v. Perrill, 140 Ind. 529, 40 N. E. 36. Where a firm allows one member to retire, and take his undivided interest in the firm real estate as security for a debt due him from the firm, the continuing members, in adjusting accounts inter se, cannot treat such real estate as partnership property without satisfying his lien. Childs v. Pellett, 102 Mich. 558, 61 N. W. 54. Where three men, who afterwards became copartners, buy land with their individual funds, each taking title to an undivided one-third interest, the fact that they afterwards use the land for firm purposes, and repair the improvements thereon at the firm expense, does not, in the absence of any express agreement to that effect, make the land firm property. Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078; Lamport v. Same, Id. Where each member of a firm holds in his individual name an undivided interest in land, which is held for the benefit of the firm, and used for partnership purposes, it is subject to firm debts. Childs v. Pellett, 102 Mich. 558, 61 N. W. 54. Land bought in the names of members of a firm will be deemed partnership property where it appears that the purchase money was charged in books as a disbursement by the firm, and that the firm occupied the land, and paid the taxes, insurance, and all other expenses. Dawson v. Parsons, 10 Misc. Rep. 428, 31 N. Y. Supp. 78. On an issue whether immovable property was acquired for the partnership, entries on the partnership books are admissible. Calder v. Creditors, 47 La. Ann. 346, 16 South. 852. Where partnership property is traced

below. Thus, where individuals, having received, through the last will of their father, a trading business, and certain lands necessary for the transaction of such a business, and actually used by the testator in connection with it, had carried on the business afterwards just as their father had before, the lands were held to be partnership property, and not an estate in joint tenancy.[89] But where two persons, owning lands jointly, had proceeded to work them together for profit, contributing the necessary expenses and sharing the losses of the enterprise, this was a case of partnership as to profits merely,[90] hence the property was not partnership property; nor would (so it was said in Steward v. Blakeway[91]) that character attach to property bought with these profits, and used in the same manner as the other. But this is doubtful.[92] In the first case the parties assumed and carried on a trading business, with which the lands came to them as an essential ingredient of it, whereas in the other the lands, being first the joint estate of the parties, were subjected simply to the co-operative efforts of the owners to make them profitable, neither party meantime actually manifesting any intention to sink his identity as an owner in his character of a partner. The distinction is often a fine one between instances of this use of property, where it is sought, as in the cases above, to have it stamped as the property of the firm, rather than of the individuals composing the firm; and, to avoid all questions of this nature, care should be taken in advance, by attaching to property the desired character, expressly, in the partnership articles. The case of Steward v. Blakeway, supra, might be thought, and justly, to conflict with the rule below as to property purchased with partnership funds.[93] Land paid for out of profits of the business, where the partnership was only as to profits, was so held to be partnership property in Morris v. Barrett,[94] but there, there had been no accounting for 20 years. The better rule is, however, that such land would belong to the partnership, rather than to the indi-

to the possession of an individual partner, the burden is on him to show that it is not partnership assets. Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394.

89 Jackson v. Jackson, 9 Ves. 591, 7 Ves. 535; Cf. Brown v. Oakshot, 24 Beav. 254, and Morris v. Barrett, 3 Younge & J. 384.

90 Morris v. Barrett, 3 Younge & J. 384.

91 4 Ch. App. 603, L. R. 6 Eq. 479.

92 Morris v. Barrett, 3 Younge & J. 384; Waterer v. Waterer, L. R. 15 Eq. 402.

93 Bates, Partn. § 257. 94 Supra, note 92.

vidual partners, notwithstanding Steward v. Blakeway. Indeed, Pollock says that it is doubtful if the latter case was one of partnership, anyway.[95]

SAME—PROPERTY PURCHASED WITH PARTNERSHIP FUNDS.

48. Anything purchased by a partner with partnership funds is presumably partnership property, without regard to the name in which it is taken and held.

The fact that a partner has actually purchased the property, using his own name, or that of another person, as the individual to hold it, does not, if the funds of the partnership were employed in making the purchase, render it any the less the firm's property.[96] In a case where the firm was composed of two partners, and certain securities were purchased with partnership funds, and were put one half in the name of one partner, and the other half in that of the other, and one partner sold the securities held in his name, and with the proceeds purchased other property in his name, it was held that the property so purchased belonged to the firm.[97] Again, where two partners purchased land in their individual names, in undivided moieties, and paid off the outstanding mortgage on it, the funds used being partnership funds, and kept an account of it in their partnership books, under the name "The T. Estate Account," and made no arrangement for a partition of the land, though each built and lived in a dwelling on separate portions of it, it was all held to be partnership property.[98] In all such cases the nominal owner holds as a trustee of the firm, to the extent of the subject of the purchase.[99] This rule applies to the case of a continuing or surviving partner, also, who attempts by this means to benefit himself to the fraud of his quondam partner, or to the fraud of the deceased partner's estate.[100]

[95] Pol. Partn. art. 27, note 5.

[96] Morris v. Barrett, 3 Younge & J. 384; Smith v. Smith, 5 Ves. 193; Robley v. Brooke, 7 Bligh (N. S.) 90; Scott v. McKinney, 98 Mass. 344; Chapin v. Clemitson, 1 Barb. (N. Y.) 311; Thursby v. Lidgerwood, 69 N. Y. 198.

[97] Fairfield v. Phillips, 83 Iowa, 571, 49 N. W. 1025.

[98] See Ex parte McKenna (Bank of England Case), 3 De Gex, F. & J. 645.

[99] Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394.

[100] Lindl. Partn. p. 325.

Resulting Trusts—Statute of Limitations.

The conveyance to one of several partners of real estate purchased with partnership funds creates a resulting trust in favor of the firm.[101] And it is an important question, in one respect, whether this conveyance is made with or without the knowledge and consent of his co-partners, for on that question it depends whether or not the statute of limitations runs against the trustee. For, as a general rule, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the cestui que trust. But time begins to run against a trust as soon as it is openly disavowed.[102] It is often the case, of course, that the property purchased by the partner in his own name was so purchased bona fide; he being, in respect of the funds used in the purchase, a borrower from the firm, in which case the presumption is overcome by this fact being shown.[103]

A partner does not need to account to the firm for a personal advantage received by him outside of the firm's affairs, nor for one inside its affairs, so received, if the benefit was given with the intention that he should enjoy it alone.[104]

101 Fairchild v. Fairchild, 64 N. Y. 471; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 167; Crow v. Drace, 61 Mo. 225; Willet v. Brown, 65 Mo. 138; Matlack v. James, 13 N. J. Eq. 126; Campbell v. Campbell, 30 N. J. Eq. 415; Jarvis v. Brooks, 27 N. H. 37; Dyer v. Clark, 5 Metc. (Mass.) 562; Buck v. Winn, 11 B. Mon. (Ky.) 320; Sigourney v. Munn, 7 Conn. 11; Greene v. Surviving Partners, 1 Ohio, 535; Bank v. Sawyer, 38 Ohio St. 329; Brooke v. Washington, 8 Grat. (Va.) 248; Bergeron v. Richardott, 55 Wis. 129, 12 N. W. 384; Martin v. Morris, 62 Wis. 418, 22 N. W. 525.

102 Prevost v. Gratz, 6 Wheat. 481; Lewis v. Hawkins, 23 Wall. 119, 126; Railroad Co. v. Durant, 95 U. S. 576; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610.

103 Lindl. Partn. p. 329. See Smith v. Smith, 5 Ves. 193; Walton v. Butler, 29 Beav. 428; Gordon v. Gordon, 49 Mich. 501, 13 N. W. 834; Richards v. Manson, 101 Mass. 482.

104 Lindl. Partn. p. 325; Campbell v. Mullett, 2 Swanst. Ch. 551; Thompson v. Ryan, Id. 565, note; Moffatt v. Farquharson, 2 Browne, Ch. 338.

SAME—TITLE TO REAL ESTATE.

49. A partnership cannot hold the legal title to real estate in its firm name.

Personalty may be acquired, held, or transferred by a partnership in its firm name. But not so with realty. A partnership may own, or even deal in, real estate, but it cannot take or hold the legal title in its firm name.[105] A partnership, as we know, is not a person, either natural or artificial, and hence no legal title to real estate can vest in it.[106] Nevertheless, if the firm, as described in the deed by which the land is sought to be conveyed to it, is sufficiently significant of the actual individuals composing the partnership to enable them, or any one or more of them, to be identified with certainty, then the instrument is good, at least, as a contract to convey, and is superior to any subsequent conveyance.[107] When a deed is made to a partnership, all the individual partners being named as grantees in it, the individuals so named will hold as tenants in common, without survivorship.[108] When the deed is simply to one partner, without any mention of the firm, this partner will take and hold the legal estate, the trust being a mat-

[105] See ante, p. 112. See, also, Rammelsberg v. Mitchell, 29 Ohio St. 22, 52; Percifull v. Platt, 36 Ark. 456. Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is, in equity, treated as personal property so far as is necessary to pay the debts of the partnership, and adjust the equities of the partners. For this purpose, in the case of the death of such partner, the survivor can sell the real estate; and, though he cannot transfer the legal title which passed to the heirs or the devisees of the deceased, the sale vests the equitable ownership, and the purchaser can compel a conveyance of the legal title. Shanks v. Klein, 104 U. S. 18. See, also, Matthews v. Hunter, 67 Mo. 293; Keith v. Keith, 143 Mass. 262, 9 N. E. 560; Burnside v. Merrick, 4 Metc. (Mass.) 537; Andrews' Heirs v. Brown's Adm'r, 21 Ala. 437; Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552; Buffum v. Buffum, 49 Me. 108; Murphy v. Abrams, 50 Ala. 293.

[106] Holmes v. Moon, 7 Heisk. (Tenn.) 506. But the equitable title is in the firm. See Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924; Harris v. Harris, 153 Mass. 439, 26 N. E. 1117; Paige v. Paige, 71 Iowa, 318, 32 N. W. 360.

[107] Dunlap v. Green, 8 C. C. A. 600, 60 Fed. 242; Percifull v. Platt, 36 Ark. 456; Arthur v. Weston, 22 Mo. 378; Moreau v. Saffarans, 3 Sneed (Tenn.) 595. See, also, Chavener v. Wood, 2 Or. 182.

[108] Percifull v. Platt, 36 Ark. 464; Riddle v. Whitehill, 135 U. S. 621, 634, 10 Sup. Ct. 924.

ter for proof aliunde. When in the deed the firm style only is used in describing the grantee, which firm style contains the complete name of an actual partner at the time, such partner takes, under the deed, a trust for the benefit of all the members of the firm.[109] But if the firm style only is used in the deed, in expressing the grantee, and the firm style so used contains no name of an actual, existing partner, the deed fails to pass a legal estate to any one, and such legal estate is thereafter in the grantor, although he holds in trust for the firm.[110]

SAME—WHEN PARTNERSHIP REALTY DEEMED PERSONALTY.

50. All land that has become property of the firm is, for the exigencies of the firm, personal property, unless some express stipulation to the contrary has been made.

In England the rule is broader, for there such land would be regarded as personal property in any event.[111] So it is said in Darby v. Darby:[112] "Whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate." And this is so, it was there further held, even where the real estate is the stock in trade, and the buying and selling it the business of the firm. The American rule is embodied, rather, in the case of Shearer v. Shearer,[113] where it was held that the change of character of real to personal estate "is worked, if at all, for the purpose of adjusting the affairs of the partnership"; and it seems that the personal character does not adhere to it, for any purpose, further than this.[114] So it has been held by the supreme

109 Holmes v. Jarrett, 7 Heisk. (Tenn.) 506.

110 Tidd v. Rines, 26 Minn. 201, 2 N. W. 497.

111 Lindl. Partn. p. 343; Steward v. Blakeway, 4 Ch. App. 603, L. R. 6 Eq. 479.

112 3 Drew. 495, 506, quoted with approval in Lindl. Partn. p. 346. But this general rule may be excluded by an express or implied agreement that the land shall not be sold. Id.

113 98 Mass. 107. See, also, Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517; Shanks v. Klein, 104 U. S. 18.

114 As between the heirs and the personal representatives of a deceased partner, lands not needed for the payment of partnership debts go to the heirs, and

court of the United States that "real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the partners, but the principle of equitable conversion has no further application." [115] The aid of equity in such cases is invoked merely that the trusts may be declared, and the legal title be made to conform to the equitable or beneficial interest. There seems to be no reason, outside of the exigencies of the settlement of the affairs of the partnership, for the aid of equity in this connection; for otherwise equity would be asked to depart from the purpose for which its aid was first sought, and so even to the extent of modifying the rules controlling the descent of the property of individuals. For, the settlement being once made,

the same rule applies to the proceeds of realty. See Collumb v. Read, 24 N. Y. 505; Foster's Appeal, 74 Pa. St. 391; Dyer v. Clark, 5 Metc. (Mass.) 562; Wilcox v. Wilcox, 13 Allen (Mass.) 252; Black v. Black, 15 Ga. 445. Partnership lands descend to the heirs subject to partnership debts. Shearer v. Shearer, 98 Mass. 111; Gray v. Palmer, 9 Cal. 616, 639; Holland v. Fuller, 13 Ind. 195; Scruggs v. Blair, 44 Miss. 406, 412. The widow has dower in partnership realty, but such dower right is subject to the payment of the partnership debts. See Willet v. Brown, 65 Mo. 138; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629; Gray v. Palmer, 9 Cal. 616, 639. In an action by one partner against his copartner to dissolve the partnership and wind up its affairs, the partnership real estate was sold under the order of court; the proceeds to be applied in payment of the firm debts, and the surplus, if any, divided between the partners. *Held*, that the purchaser at the sale took the land free from any inchoate interest of the wives of the partners, and that it was immaterial that the land brought a price in excess of the amount necessary to pay the firm debts. Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010. Partnership realty is subject to all the attributes of personal property until the final settlement of the partnership affairs, and after such settlement any real estate that may be left resumes its attributes of real property, and descends to the heirs. Darrow v. Calkins, 6 App. Div. 28, 39 N. Y. Supp. 527. Land which is partnership property is, as between partners and those dealing with them with knowledge of the facts, personal estate. Moore v. Wood, 171 Pa. St. 365, 33 Atl. 63. Generally, for what purposes partnership realty is deemed personalty, see Rovelsky v. Brown, 92 Ala. 522, 9 South. 182; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078; Paige v. Paige, 71 Iowa, 318, 32 N. W. 360; Fairchild v. Fairchild, 64 N. Y. 471.

[115] Riddle v. Whitehill, 135 U. S. 621, 635, 10 Sup. Ct. 924. And see Clagett v. Kilbourne, 1 Black, 346; Shanks v. Klein, 104 U. S. 18; Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517.

the partners are partners no more, but individuals merely, and their property interests are only those of individuals.

SAME — CONVERSION OF PARTNERSHIP PROPERTY INTO SEPARATE PROPERTY, AND VICE VERSA.

51. By agreement of all the partners, firm property may be converted into separate property, and separate property may be converted into firm property.

52. In the absence of fraud, such agreements are good, even against creditors.

What Rights a Partner Has in Firm Property.

We have seen that the property of a partnership is strictly such, in contradistinction to what might otherwise be individual property, according to the several interests of the partners in the firm; and we shall see that the only right of a partner to the body of such property refers to such share as shall be coming to him after a dissolution shall have been had, and a settlement of all firm debts.[116] From this it appears that such a settlement contemplates necessarily a payment of firm debts out of firm property, as far as possible. It must not be inferred from this, however, that creditors of a partnership have, by reason alone of the debts due them, any rights in this property. If they had, then any firm that owed anything at all would find it difficult to do business; for it could give no clear title to anything it might sell, the purchaser having in such case to take the commodity incumbered always with the lien of the creditor.[117]

What Rights a Creditor Has in Firm Property.

This manner of paying firm creditors out of firm property is not, therefore, resorted to so much in deference to any rights of creditors as to the right of the partners to manage their firm affairs most conveniently for themselves.[118] As it was said by the court in Case v. Beauregard,[119] defining such rights as creditors have in

116 See post, p. 132.

117 See post, p. 273; Lindl. Partn. p. 334.

118 See post, p. 273, "Distribution."

119 99 U. S. 119, 124. See, also, Kelly v. Scott, 49 N. Y. 595; Huiskamp v. Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899; Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369. Each partner may compel property in immovables acquired

the premises: "This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm." And the court says further: "Their equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him." This being the case, such rights as creditors have, being merely equitable, as we have seen, are enforceable only when the property is "within control of the court, and in the course of administration,—brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode."

Conversion of Partnership or Separate Property.

It follows, then, that the conversion of partnership property into separate property, or of separate property into partnership property, if done with the consent of all the partners, is valid, and valid not only as between the partners themselves, but also as to outside persons who have dealt with the firm or the persons composing it, and are creditors as the result of such dealings.[120] Fraud, however, vitiates all things in which it is involved; hence, if such a conversion is attempted with a fraudulent purpose, it is void.[121]

What Amounts to Fraud in Connection with Such Transfers.

And fraud, in this connection, does not imply fraud actual and deliberate only, but anything, without regard to the intention underlying it, to which the law imputes fraud by reason of the cir-

for the partnership to be applied on partnership debts, and in the event of a cession by one partner the right passes to the syndic. Calder v. Creditors, 47 La. Ann. 346, 16 South. 852.

[120] Creditors are not entitled to be consulted. Lindl. Partn. p. 334; Campbell v. Mullett, 2 Swanst. Ch. 575; Ex parte Clarkson, 4 Deac. & C. 56; Ex parte Peake, 1 Madd. 358; Darby v. Gilligan, 33 W. Va. 246, 10 S. E. 400; Huiskamp v. Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899; Allen v. Valley Co., 21 Conn. 130; Howe v. Lawrence, 9 Cush. (Mass.) 553; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480. As to dealings between one partner and the firm, see Bolton v. Puller, 1 Bos. & P. 539. As to changes of property on change of firm, see Lindl. Partn. p. 336; Bates, Partn. § 550 et seq.; Ex parte Ruffin, 6 Ves. 119; Ex parte Walker, 4 De Gex, F. & J. 509; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007; Olson v. Morrison, 29 Mich. 395; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853.

[121] Lindl. Partn. p. 338; Ex parte Rowlandson, 1 Rose, 416; Luff v. Horner, 3 Fost. & F. 480.

cumstances.[122] Thus, generally, where the conversion appears to have been attempted by an insolvent firm or an insolvent partner, or by a firm or partner in contemplation of insolvency, fraud may be imputed from the facts proved.[123]

Preferences among Creditors not Necessarily Evidence of Fraud.

Whether a preference among creditors amounts to an evidence of fraud or not depends upon the aspect given to preferences by the laws prevailing in the particular locality where the case arises, though generally the taint of fraud attaches where the purpose of the act is the benefiting of the person making the preference, without regard to whether other creditors are or are not hindered and delayed to the knowledge of the creditor preferred. Thus, where one of two failing partners, with the consent of the other, had given a mortgage upon chattels theretofore the property of the firm to his separate creditor, as security for a bona fide debt, the mortgage was upheld, and the court there said, "A debtor in failing circumstances having the right to prefer a creditor, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent, and that the debtor's intention is to hinder and delay other creditors." [124]

[122] Constructive fraud is sufficient to have this effect. See Lindl. Partn. p. 338; Ex parte Mayou, 4 De Gex, J. & S. 664; Ex parte Walker, 4 De Gex, F. & J. 509.

[123] In re Kemptner, L. R. 8 Eq. 286, and cases cited supra, note 122.

[124] Huiskamp v. Wagon Co., 121 U. S. 310, 319, 7 Sup. Ct. 899. See, also, Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369; Case v. Beauregard, 99 U. S. 119; Allen v. Center Valley Co., 21 Conn. 130; Goembel v. Arnett, 100 Ill. 34; Hapgood v. Cornwell, 48 Ill. 64; Dimon v. Hazard, 32 N. Y. 65; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Second Nat. Bank of Red Bank v. Farr (N. J. Ch.) 7 Atl. 892. Partners may divide assets among themselves. Moline Wagon Co. v. Rummell, 14 Fed. 155; Poole v. Seney, 66 Iowa, 502, 24 N. W. 27; Crane v. Morrison, 4 Sawy. 138, Fed. Cas. No. 3,355; Giddings v. Palmer, 107 Mass. 269; Jones v. Lusk, 2 Metc. (Ky.) 356; McKinney v. Baker, 9 Or. 74; Atkins v. Saxton, 77 N. Y. 195; Darland v. Rosencrans, 56 Iowa, 122, 8 N. W. 776. A co-partnership does not hold its property in trust for its creditors, nor have its creditors a lien upon its property by reason of being such, so as to preclude it from preferring one of its creditors in good faith. Aetna Ins. Co. v. Bank of Wilcox (Neb.) 67 N. W. 449; Richards v. Leveille, 44 Neb. 38, 62 N. W. 304. A disposition by an insolvent firm, with the consent of all the members, of its assets

No Formal Instrument Essential to the Conversion.

Provided the agreement between the partners by which the act is effected is executed,[125] there need be no written conveyance or other formalities in order to complete the conversion of the firm property into separate property, or the contrary.[126]

PARTNERSHIP SHARES.

53. The characteristics of shares in partnerships will be treated under the following heads:

(a) Nature of a partner's share (p. 132).

(b) Amount of each partner's share (p. 138).

(c) Taking on execution for individual debt of partner (p. 141).

(d) Transfer of shares (p. 153).

SAME—NATURE OF A PARTNER'S SHARE.

54. The interest of a partner in partnership property is a peculiar one, and is best indicated by simply calling it an "estate in partnership."

in payment of an individual debt of one of its members, is good as against firm creditors. Sylvester v. Henrich (Iowa) 61 N. W. 942. Cf. Jackson Bank v. Durfey, 72 Miss. 971, 18 South. 456, where it was held that the individual members of an insolvent firm cannot convert the partnership estate to the payment of the individual debts of its members, leaving the firm debts unpaid. See, also, Erb v. West (Miss.) 19 South. 829. A trust deed executed by a member of an insolvent firm, on his own property, to secure the individual debt of his partner, for which he was not bound, is fraudulent as to creditors of the firm, and will be set aside. Erb v. West, supra. See, also, Bates, Partn. § 559 et seq., for an elaborate review and classification of the cases.

[125] Agreement must be executed. Lindl. Partn. 337; Bates, Partn. § 541; Ex parte Wheeler, Buck, 25; Ex parte Wood, 10 Ch. Div. 554; Ex parte Sprague, 4 De Gex, M. & G. 866; Jones v. Neale, 2 Pat. & H. (Va.) 339; Fitzgerald v. Christl, 20 N. J. Eq. 90; National Bank of Jacksonville v. Mapes, 85 Ill. 67; Smith v. Ramsey, 6 Ill. 373; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Mafflyn v. Hathaway, 106 Mass. 414; Sharpe v. Johnston, 59 Mo. 557.

[126] Lindl. Partn. p. 334. See Pilling v. Pilling, 3 De Gex, J. & S. 162; Ex parte Williams, 11 Ves. 3.

55. The characteristic features of an estate in partnership are the following:

(a) The title of partnership property is in all of the partners jointly, but the partners are neither

(1) Tenants in common (p. 133),

(I) Because a sale of a partner's interest does not pass an undivided interest in the property, but only such partner's share of what remains after all partnership debts are paid, and

(II) Because a sale of specific partnership property by a partner passes the whole title, and not simply the seller's individual interest, nor

(2) Joint tenants (p. 135),

(I) Because there is no beneficial survivorship, and

(II) Because one partner can sell partnership property in the lifetime of his co-partners.

(b) A partner's share simply entitles him to a given proportion of what remains after all the firm debts have been paid (p. 137).

(c) A partner is not entitled to a partition or division of the property in kind (p. 137).

There has been always a question as to the nature of partnership property; that is, whether this property is an estate in common or one in joint tenancy, inasmuch as it is characterized by features found in both. It is held by all the partners, and since it is the substantial effect of individual contributions of money or service, as the case may be, it is difficult to understand at first that the individuals do not own it each in the ratio of his separate interest in the business.

Partners are not Tenants in Common of the Firm Property.

It might appear that here is unity of possession, and since, after the partnership shall have been dissolved, each will be restored his proportion again, instead of all the property going into the estate

of the survivor, and since any one of the partners may convey his share to a stranger meantime, there seems to be an absence of that survivorship without which there can be no estate in joint tenancy. But, while the property thus is held by all the partners, it is held by them as members of their firm; and, just as has been said of the partnership capital, so it is to be said of partnership property generally, that a partner does not own any part of it.[127] Partners are not tenants in common. For while a partner may, as was said above, convey his share to a stranger, the stranger will take nothing whatsoever by the conveyance until after a dissolution of the partnership, and a settlement with the partnership creditors, to whom he is postponed.[128] Even if a personal judgment is recovered against a partner for a private debt, and execution follows the judgment, a levy on the partner's share will affect nothing but what it may afterwards appear that the partner is entitled to; that is, after the dissolution of the partnership, the payment of all the firm creditors, and a determination of the share of the partner in the property that remains.[129] For that is the significance of the word "share," as used in such a connection; it having been well defined as "the value of his [partner's] original contribution, increased or diminished by his share of profit or loss."[130] But then the effect of a sale of property by an individual is very different where the individual was a tenant in common with the person interested with him in the ownership of the property from what it is where he was his partner in it. Thus, in the case of Person v. Wilson[131] there was a question whether a partnership or a tenancy in common subsisted between certain individuals, because, all the property having been

[127] Lindl. Partn. p. 339; Bank v. Carrollton Railroad, 11 Wall. 624; U. S. v. Hack, 8 Pet. 271; Lingen v. Simpson, 1 Sim. & S. 600; Cockle v. Whiting, Tam. 55.

[128] Menagh v. Whitwell, 52 N. Y. 146; Durborrow's Appeal, 84 Pa. St. 404; Collins' Appeal, 107 Pa. St. 590; Whigham's Appeal, 63 Pa. St. 194; Sindelare v. Walker, 137 Ill. 43, 27 N. E. 59; Carrie v. Commercial Co., 90 Cal. 84, 27 Pac. 58. But such purchaser takes whatever would have been due his vendor in preference to the latter's unsecured creditors. Thompson v. Spittle, 102 Mass. 207. The vendee acquires merely a jus in personam, and not a jus in rem. Bates, Partn. § 183. He does not become a tenant in common. Donaldson v. Bank, 1 Dev. Eq. (N. C.) 103; Bank v. Carrollton Railroad, 11 Wall. 624.

[129] Reinheimer v. Hemingway, 35 Pa. St. 432; Sanborn v. Royce, 132 Mass. 594; Bank v. Carrollton Railroad, 11 Wall. 624. See post, p. 141.

[130] Indian Contract Act. See Pol. Partn. art. 33.

[131] 25 Minn. 189, 194.

sold by one of them, the sale would, on the latter hypothesis, have carried only the seller's individual interest.[132] In another case the rights of a purchaser from a member of a defunct partnership of a judgment in favor of the latter, which judgment had been previously sold by the firm's assignee to a person secretly representing the partners, was sustained on the ground that the sale to the successful party had been made by a partner, and not a tenant in common;[133] not, of course, a partner as of the old firm, but in respect of the transaction of buying and selling the judgment.

Partners are not Joint Tenants of the Firm Property.

Close examination into the question results in little that is more substantial where the claim is made that firm property is held in joint tenancy. To be sure, so far as concerns the existence of some sort of survivorship, this claim has a semblance of a basis; for, if the partner dies, the whole property goes to the surviving copartner, instead of going proportionably to the executor of the deceased.[134] It has been said that, just as a pledgee or mortgagee has a right to hold the property in his hands until the debt due him is paid, so a surviving partner may hold partnership property until the debts of the firm are paid, whether such debts run to general firm creditors or to himself, and that the statute of limitations will not run against him, so as to render his hold upon the assets the less valid until such debts are paid.[135] The surviving copartner has the closing up of the partnership affairs, the reduction of its property into cash for the payment of the firm debts, and the actual payment of these debts,[136] without the executor having the right to interfere, except, of course, that he has access to the courts to compel this surviving partner to proceed to close up the business,[137] and to have his proceedings scrutinized to the end that the estate be not made to suffer through any fraud of his.[139] And it is necessary at times for the executor thus to have the survivor

132 Mersereau v. Norton, 15 Johns. (N. Y.) 180; Thompson v. Bowman, 6 Wall. 316.

133 Thursby v. Lidgerwood, 69 N. Y. 198.

134 See post, p. 410.

135 Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964.

136 See post, p. 410; also, Buckley v. Barber, 6 Exch. 164.

137 Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964.

139 Knox v. Gye, L. R. 5 H. L. 656.

compelled to proceed to close up the firm's affairs; for the standing idly by of those interested in the estate of the deceased partner, while the survivor continues the business, using the property of the partnership as before, must result in the subordination of the rights of the estate in the assets to those of subsequent creditors of the firm.[140] But this is the extent of the right to interfere, and, while the whole property does not become part of the permanent estate of this survivor, the latter can, by his disposition of it in aid of such settlement, bind the executor and the heirs and devisees of the deceased partner so that they may be compelled subsequently, in a court of equity, to give effect to such a disposition so far as they may be able to do so.[141] This is all that the survivorship really amounts to in connection with partnership property; for, after paying all the firm debts, the survivor's right to the corpus of that property ends. He has his share, and the executor or other representative of the deceased has the share of the latter after the settlement of the firm's affairs is done.[142] Thus, the tenancy can be no more properly called "joint" than "in common." It has, it is true, been said that this holding by the survivor is not that of a trustee;[143] but it has not ever been claimed that it is beneficial to himself, although in Holbrook v. Lackey[144] a firm debtor sued by such survivor was allowed to set off the latter's private indebtedness. However, in a situation like the last the survivor would be required to account for this in his settlement, so that here is no attempt to give to the holding a beneficial character. Pollock describes partners, with reference to their title generally to partnership property, as "owners in common or joint owners without benefit of survivorship,"[145] as if it is not necessary to be specific in the matter at all; and it has elsewhere been said that, although it is essential to a partnership that there be a community of interest in the substance of it, "this community of interest must not be that of mere joint tenants or tenants in common."[146] The title of part-

140 Hoyt v. Sprague, 103 U. S. 613.

141 Shanks v. Klein, 104 U. S. 18.

142 Crosw. Ex'rs & Adm'rs, p. 240.

143 Knox v. Gye, L. R. 5 H. L. 656. But see Jones v. Dexter, 130 Mass. 380.

144 13 Metc. (Mass.) 132.

145 Pol. Partn. c. 6, art. 27.

146 Donnell v. Harshe, 67 Mo. 172. See Lindl. Partn. p. 332.

ners to firm property can best be said merely to bear an analogy to these two species of tenancy in respect of different features of each of them. For partnership property, as we have seen, is (theoretically, at least) always of a personal nature, which the significance of the old feudal tenancies does not properly touch. Besides this, the fact being that one partner can sell all the firm assets, and that, too, in the lifetime of his co-partner,[147] it is plain that the law of neither tenancy controls either the relation or its property.[148]

Share a Right to Money.

What is meant by the "share" of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged.[149] When a partnership is dissolved or terminated, any one of the partners is entitled to have the whole assets sold and the proceeds applied to the payment of partnership debts, and whatever then remains is to be divided among the partners in proportion to their several shares. No partner is entitled to a partition of the property in kind, whether the property is real or personal.[150]

147 See post, p. 234.

148 "The legal title of real estate, if in the name of more than one partner, is always held by them as tenants in common; but, in equity, it may be partnership property." Bates, Partn. § 280.

149 "The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the co-partnership, in the surplus of those assets remaining after all partnership debts are fully paid. It appears in this case that firm was insolvent; that its debts much exceeded its assets; that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property, was nothing; and so the plaintiff got nothing for his purchase." Staats v. Bristow, 73 N. Y. 264, 267. As to the nature of a partner's interest, see, also, Menagh v. Whitwell, 52 N. Y. 146; Hiscock v. Phelps, 49 N. Y. 97; Sindelare v. Walker, 137 Ill. 43, 27 N. E. 59; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Fourth Nat. Bank v. Railroad Co., 11 Wall. 624; Filley v. Phelps, 18 Conn. 294; Douglas v. Winslow, 20 Me. 89. A partner's share is a right to money. Lindl. Partn. p. 339. A partner can compel a sale and a division of the proceeds, but not a partition of the partnership property. Wild v. Milne, 26 Beav. 504. A partner's interest is a chose in action. Ames, Cas. Partn. 163. A partner's claim for an accounting after a dissolution must be brought within the period prescribed by the statute of limitations, or it will be barred. Knox v. Gye, L. R. 5 H. L. 656, approved in Taylor v. Taylor, 28 Law T. 189. See, also, Coudrey v. Gilliam, 60 Mo. 86; Massey v. Tingle, 29 Mo. 437; Manchester v. Mathewson, 3 R. I. 237; Pierce v. McClellan, 93 Ill. 245; Strange v. Graham, 56 Ala. 614.

150 Wild v. Milne, 26 Beav. 504.

SAME—AMOUNT OF EACH PARTNER'S SHARE.

56. The amount of each partner's share in the partnership property depends upon the agreement into which the partners have entered.

57. In the absence of evidence showing a contrary intention, the shares of all the partners are presumed to be equal.

The proportions in which the members of a firm are entitled to the property of the firm, or, in other words, the amount of each partner's share in a partnership, depends upon the agreement into which the partners have entered.

Shares are Prima Facie Equal.

In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be decided like any other pure question of fact;[151] and, if there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn,[152] the shares of all the partners will be adjudged equal.[153]

"This rule, no doubt, occasionally leads to apparent injustice; but it is not easy to lay down any other rule which, under the circumstances supposed, could be fairly applied. It is sometimes suggested that the shares of partners ought to be proportionate to their contributions; but, without in any way denying this, it may be asked, how is the value of each partner's contribution to be measured? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his command of the confidence and respect of others, must all be taken into account; and, if it is impossible to set a money value on each partner's contribu-

[151] See Peacock v. Peacock, 16 Ves. 49; McGregor v. Bainbridge, 7 Hare, 164; Binford v. Dommett, 4 Ves. 756.

[152] Stewart v. Forbes, 1 Macn. & G. 137; Webster v. Bray, 7 Hare, 159; Copland v. Toulmin, 7 Clark & F. 349.

[153] Robinson v. Anderson, 20 Beav. 98, 7 De Gex, M. & G. 239; Peacock v. Peacock, 16 Ves. 49; Webster v. Bray, 7 Hare, 159; Farrar v. Beswick, 1 Moody & R. 527; Henry v. Bassett, 75 Mo. 89; Whitcomb v. Converse, 119 Mass. 38; Ligare v. Peacock, 109 Ill. 94; Griggs v. Clark, 23 Cal. 427; Kilpatrick v. Mackay, 4 Vict. Law R. 28.

tion in this respect, it is obviously impossible to determine in the manner suggested the shares of the partners in the partnership. Nor can it be said to be unreasonable to infer, in the absence of all evidence to the contrary, that the partners themselves have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequal as regards skill, connection, or character. Whether, therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not labored equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into." [154]

Meaning of "Equality."

When it is said that the shares of partners are prima facie equal, although their capitals are unequal, what is meant is that losses of capital, like other losses, must be shared equally; but it is not meant that, on a final settlement of accounts, capitals contributed unequally are to be treated as one aggregate fund, which ought to be divided between the partners in equal shares.[155] On the contrary, if an intention not to consider the contributions as equal is shown, the contribution of each partner must be returned to him before any division takes place.[156] Whatever remains represents profits, and is to be equally divided, unless an agreement to share in some other proportion is shown.[157] If, instead of profits being

154 Lindl. Partn. p. 349. See, also, Roach v. Perry, 16 Ill. 37; Farr v. Johnson, 25 Ill. 522; Taft v. Schwamb, 80 Ill. 289; Ligare v. Peacock, 109 Ill. 94; Northrup v. McGill, 27 Mich. 234; Gould v. Gould, 6 Wend. (N. Y.) 263; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Ratzer v. Ratzer, 28 N. J. Eq. 136; Henry v. Bassett, 75 Mo. 89. But see Peacock v. Peacock, 2 Camp. 45, and Sharpe v. Cummings, 2 Dowl. & L. 504, where it was held to be for the jury to say what shares the partners were reasonably entitled to. Lindley says (Partn. p. 349, note k) that these cases cannot be supported.

155 Lindl. Partn. p. 350. "This doctrine must be kept distinct from divisions of capital and repayment of capital on winding up. It relates only to dividing profit and loss, but does not alter the treatment of capital, as if a debt, to be first paid before profits are divided, and, in case of impairment, be repaid less the equalization of losses." Bates, Partn. § 181.

156 See ante, p. 114, and cases cited. 157 See cases cited in note 154, supra.

realized, a loss is incurred, so that the capital is impaired, prima facie the loss is to be equally, and not proportionally, borne.[158]

Evidence Showing Inequality.

An agreement for inequality may be conclusively inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books.[159] Moreover, if an agreement for inequality clearly at one time existed, no presumption of any alteration in this respect will arise from the mere fact that some of the original members have retired. In the absence of evidence to the contrary, the inference is that the shares of the retiring members have been taken by the continuing parties in the proportions in which these last were originally interested in the concern.[160]

Rule as to Presumptive Equality Applies to Partnerships in Single Transactions.

The rule that the shares of partners are equal, unless they have otherwise agreed, applies not only to persons who are partners in business generally, but also to those who are partners as regards one single matter only.[161] Thus, in Robinson v. Anderson,[162] where two solicitors, not in partnership, were jointly retained to defend certain actions, and there was no satisfactory evidence to show in what proportions they were to divide their remuneration, it was held that they were entitled to share it equally, although they had been paid separately, and had done unequal amounts of work.

Applications of Rule Where One Firm Comprises Another.

A question of some difficulty arises when a firm, say of two partners, engages in a partnership speculation with a third person, not a member of that firm. Is the interest of such person in the speculation to be treated as one-half, the other two persons being treated as one? Or is the interest of each of the three to be treated as

158 See ante, p. 116. See, also, Flagg v. Stowe, 85 Ill. 164; Whitcomb v. Converse, 119 Mass. 38.

159 Lindl. Partn. p. 350; Bates, Partn. § 181. See Stewart v. Forbes, 1 Macn. & G. 137. See Moore v. Trieber, 31 Ark. 113, where partners were held bound by a particular course of dealing.

160 Robley v. Brooke, 7 Bligh (N. S.) 90.

161 Webster v. Bray, 7 Hare, 159; McGregor v. Bainbridge, Id. 164, note; Hanslip v. Kitton, 8 Jur. (N. S.) 835.

162 20 Beav. 98.

equal, each taking one-third? The answer to these questions must depend upon whether the two partners entered into the speculation as a firm, or as two individuals. If the former, there will, in substance, be only two parties interested in the speculation, and the profits thereof must be divided into two equal parts, while, if the latter is the case, there will be three parties interested, and the profits must be divided into three equal parts.[163]

SAME—SALE OF PARTNER'S INTEREST ON EXECUTION.

58. A partner's interest may be sold on execution for his private debts. The purchaser becomes entitled to receive only what may be found due such partner after an accounting and settlement of the partnership affairs.

But, while the right to levy is thus conceded, the authorities differ widely as to the course to be pursued by the creditor and the officer executing the writ. In some cases the right of the officer to take the goods, even temporarily, out of the immediate possession and control of the other partners, is denied.[164] In others a temporary interruption of possession in order to take an inventory is reluctantly permitted. In still others it is held that the officer may, and for his own security and that of the execution creditor should, take possession of all the chattels levied on, and, after the sale of the debtor's interest therein, redeliver the same to the other partners and the purchaser, who are said to be tenants in common of the chattels so sold.[165] But it is well settled that the separate

163 Lindl. Partn. p. 351; Warner v. Smith, 1 De Gex, J. & S. 337; Conwell v. Sandidge's Adm'r, 5 Dana (Ky.) 210; Turnipseed v. Goodwin, 9 Ala. 372.

164 Morrison v. Blodgett, 8 N. H. 238, and cases cited, infra, notes 169, 196, 197. Under Pub. St. c. 151, § 2, cl. 11, as amended by St. 1884, c. 285, providing that in a suit in equity to subject the interest of a partner to the payment of a debt, unless the debt is in judgment, the business of the partnership shall not be interfered with "until the plaintiff's debt is established," and, if either co-partner shall give plaintiff a bond for the amount of his claim, "the court shall proceed no further therein save to establish the debt," the court, sitting in equity, may proceed to establish the debt when it is not in judgment. Draper v. Hollings, 163 Mass. 127, 39 N. E. 793.

165 Nixon v. Nash, 12 Ohio St. 647. In execution of judgment against a part-

creditor or the purchaser at such sale acquires only the beneficial interest of the debtor partner.[166] The sale operates as a dissolution of the partnership, and calls for an accounting and settlement of the partnership business.[167]

In Morrison v. Blodgett [168] it was held that partnership property cannot be seized under attachment or execution for the private debt of a partner, but that a partner's interest may be seized and sold under execution, but not the goods themselves, or any part thereof.

ner, the sheriff must seize all, because the moieties are undivided, and must sell the undivided moiety, and the vendee will be tenant in common with the other partner. Heydon v. Heydon, 1 Salk. 392. Where one partner becomes bankrupt, his assignees are tenants in common with the solvent partner of an undivided moiety of the partnership effects, subject to the partnership accounts. West v. Skip, 1 Ves. Sr. 242. "There are other difficulties attending this subject, some of which cannot, perhaps, be fully obviated without legislation. It would seem that, like bankruptcy in England, such sale must operate, ipso facto, as a dissolution of the partnership. Marquand v. Manufacturing Co., 17 Johns. (N. Y.) 529, 535. And several of the authorities before cited say that the purchaser becomes a tenant in common with the other partner, and takes the undivided share subject to the rights of the other partner. Fox v. Hanbury, Cowp. 449; Gow, Partn. 285, 310, 365, 391; Skipp v. Harwood, 2 Swanst. Ch. 586. If the purchaser is to be regarded as a tenant in common with the other partner of the partnership goods, he may, perhaps, have the ordinary rights of such tenant, and be entitled, like the assignees in bankruptcy, to hold such of the goods of the partnership as may come to his hands, subject to the account. Murray v. Murray, 5 Johns. Ch. (N. Y.) 70. There are, however, expressions in some of the cases indicating that such sale would give the purchaser no right to take possession of any of the goods, but only to demand an account. Dob v. Halsey, 16 Johns. (N. Y.) 34, 39; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 525; Church v. Knox, 2 Conn. 517. And perhaps the same duties do not devolve on him as upon an assignee, or the same rights accrue to him." Morrison v. Blodgett, 8 N. H. 238, 253.

[166] See cases cited infra. Generally, as to position of purchasers under execution against partner, see, also, Rainey v. Nance, 54 Ill. 29; Ross v. Henderson, 77 N. C. 170; Tredwell v. Rascoe, 14 N. C. 50; Price v. Hunt, 33 N. C. 42; Latham v. Simmons, 48 N. C. 27; McCutchon v. Davis (Tex. Sup.) 8 S. W. 123; Clagett v. Kilbourne, 1 Black, 346; Osborn v. McBride, 3 Sawy. 590, Fed. Cas. No. 10,593; Polk v. Gallant, 22 N. C. 395; Buck v. Winn, 11 B. Mon. (Ky.) 320; Crow v. Drace, 61 Mo. 225; Black v. Long, 60 Mo. 181; Cowden v. Cairns, 28 Mo. 471. Private creditors by attachment acquire only the interest left after the satisfaction of the firm debts. Wright v. Radcliffe, 1 Mo. App. Rep'r, 389.

[167] Lindl. Partn. p. 358. See post, p. 396.

[168] 8 N. H. 238.

On principle this seems to be the correct view.[169] We quote from the able and elaborate opinion of Parker, J.:

"Formerly it was, undoubtedly, the practice to levy an execution against one of several partners upon all or a part of the goods

[169] The following cases support the view that, on an execution against one partner, the sheriff cannot seize and take into his exclusive possession specific articles belonging to the firm, but, at most, can only seize the interest of the partner, whatever it may be, as determined by a final accounting. Knerr v. Hoffman, 65 Pa. St. 126; Vandike v. Rosskam, 67 Pa. St. 330; Sirrine v. Briggs, 31 Mich. 443; Haynes v. Knowles, 36 Mich. 407; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Whigham's Appeal, 63 Pa. St. 194; Daniel v. Owens, 70 Ala. 297; Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Sanborn v. Royce, 132 Mass. 594; Fay v. Duggan, 135 Mass. 242; Gibson v. Stevens, 7 N. H. 352; Page v. Carpenter, 10 N. H. 77; Jarvis v. Hyer, 4 Dev. (N. C.) 367; Deal v. Bogue, 20 Pa. St. 228; Richards v. Haines, 30 Iowa, 574. And see Brande v. Bond, 63 Wis. 140, 23 N. W. 101. The great weight of the early authorities, however, is opposed to this view; and even some recent cases recognize the right of the sheriff to assume exclusive possession of the partnership property and retain it until the sale. See Heydon v. Heydon, 1 Salk. 392; Johnson v. Evans, 7 Man. & G. 240; Mayhew v. Herrick, 7 C. B. 229; U. S. v. Williams, 4 McLean, 236, Fed. Cas. No. 16,719; White v. Jones, 38 Ill. 159; Newhall v. Buckingham, 14 Ill. 405; Smith v. Orser, 42 N. Y. 132; Eighth Nat. Bank v. Fitch, 49 N. Y. 541; Atkins v. Saxton, 77 N. Y. 195; Fogg v. Lawry, 68 Me. 78; Sanders v. Young, 31 Miss. 111; Scrugham v. Carter, 12 Wend. (N. Y.) 131; Randall v. Johnson, 13 R. I. 338; Latham v. Simmons, 3 Jones (N. C.) 27; Watson v. Gabby, 18 B. Mon. (Ky.) 658; Reed v. Shepardson, 2 Vt. 120; Russ v. Fay, 29 Vt. 381; Branch v. Wiseman, 51 Ind. 1; Clark v. Cushing, 52 Cal. 617; Stevens v. Stevens, 39 Conn. 474. But he must sell all, not a part. Stumph v. Bauer, 76 Ind. 157. The interest of a limited partner cannot be seized and sold by the sheriff, in New York. Harris v. Murray, 28 N. Y. 574. A valid lien, as against a debtor who is a member of a partnership, may be acquired by attaching all his interest in the effects of the firm, and summoning the other partners as trustees; and such lien may be preserved by notice to the parties concerned, and such other acts designed to give notoriety to the attachment as the nature of the property will admit, although possession cannot be taken, and the property removed, to the exclusion of the other partners. Such lien is not acquired, so as to support a bill against the firm for an account, by merely summoning the other partners as trustees. Treadwell v. Brown, 43 N. H. 290. In Burnell v. Hunt, 5 Jur. 650, Patteson, J., said: "The proper course is for the sheriff to seize the whole, and to sell the share of the execution partner, and the vendee will have to settle the matter in chancery. The sheriff has no power to take the property out of the hands of the other partner." In Smith v. Orser, 42 N. Y. 132, it was said that the sheriff, under attachments against two members of a partnership consisting of three members, takes and holds possession of the partnership property, although at the execution sale he sells only the interest of the partner against whom the execution is issued. Affirming Wad-

which belonged to the partnership. Various cases are found, showing the practice at law to seize the specific property and sell a moiety or undivided share of it.[170] The language of some of these cases would indicate that the undivided share of the debtor partner in the goods seized was sold, without any reference to the debts of the partnership, although Lord Hardwicke understood the cases in Salkeld and Lord Raymond as holding 'that judgment and execution against one partner, for his separate debt, does not put the other in a worse condition, for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him.'[171] Cases have certainly existed in which a partnership was treated at law as a tenancy in common, without reference to a partnership account, so far as it respected such seizure and sale, and as a tenancy in common of each chattel which belonged to the partnership; for in many instances only a part of the goods have been seized, and the undivided share in separate articles has been sold to different individuals.[172] Some of the early

dell v. Cook, 2 Hill (N. Y.) 48. In Johnson v. Evans, 7 Man. & G. 240, it was said that it is an admitted general rule of law that the judgment creditor of any partner may take in execution against that partner as well his separate property as his share or interest in all the personal property of the partnership that is tangible and capable of being seized; and it is undoubtedly true that in order to make, and for the purpose of making, the execution effectual against the share of the debtor partner in the joint property, the sheriff must seize the whole, the shares of the two partners being undivided. It has sometimes been held that a partner's interest may be reached by garnishment of his co-partners. But, as this involves an accounting at law between partners, it would seem to be improper, in the absence of statutory authority. See Bates, Partn. § 1113; Rood, Garnish. § 156 et seq. Code Ga. 1882, § 1919, prohibits the sale of a partner's interest in execution under the common-law proceeding, and provides that the interest of a partner in the partnership assets may be reached by garnishment. Willis v. Henderson, 43 Ga. 325. An execution creditor of one member of a partnership is not entitled to judgment in a garnishment proceeding against a debtor to such partnership. Johnson v. King, 6 Humph. (Tenn.) 233. And see Tobey v. McFarlin, 115 Mass. 98.

[170] Heydon v. Heydon, 1 Salk. 392; Jacky v. Butler, 2 Ld. Raym. 871; Bachurst v. Clinkard, 1 Show. 173; Marriott v. Shaw, Comyn, 277; King v. Manning, Id. 619; Parker v. Pistor, 3 Bos. & P. 288; Chapman v. Koops, Id. 289; Morley v. Strombom, Id. 254; Barker v. Goodair, 11 Ves. 85; Lyndon v. Gorham and Trustee, 1 Gall. 368, Fed. Cas. No. 8,640.

[171] West v. Skip, 1 Ves. Sr. 239, 242.

[172] Dutton v. Morrison, 17 Ves. 205; Waters v. Taylor, 2 Ves. & B. 301. "Before the time of Lord Mansfield it seems that the sheriff was in the habit of act-

cases speak of a seizure of all the goods of the partnership, but this, evidently, has not been regarded as necessary to the validity of the proceeding.[173] Probably no more was intended than that the sheriff could not divide off and seize a moiety of the goods, and sell all which he seized.[174] Although it seems that in Eddie v. Davidson[175] the whole interest in the goods seized was sold, and the sheriff was ordered to pay a share of the money levied to the assignees of the other partner. Comyns says: 'If A., B., and C. are partners, and judgment and execution is sued against A., only his share of the goods can be sold. It is true, the sheriff may seize the whole, because the share of each, being undivided, cannot be known; and, if he seize more than a third part, he can only sell a third of what is seized, for B. and C. have an equal interest with A. in the goods seized; but the sheriff can only sell the part of him against whom judgment and execution was sued.'[176] Proceedings at law would have been more simple, and conducted more easily, had this practice been continued; but when the courts of equity adopted the position that the partnership property was a fund, in the first instance, for the payment of the partnership debts, that the interest of each partner in the partnership was only his share

ing upon the supposition that each partner was entitled to an undivided share of every article belonging to the firm, without reference to the state of the partnership accounts; and, in executing a fi. fa. against a partner for his separate debt, the sheriff seized the whole of the partnership effects, or of so many of them as were requisite, and sold the undivided share of the judgment debtor therein." Lindl. Partn. p. 356. See Heydon v. Heydon, 1 Salk. 392; Jacky v. Butler, 2 Ld. Raym. 871; Bachurst v. Clinkard, 1 Show. 169; Pope v. Haman, Comb. 217; Marriott v. Shaw, Comyns, 277; Dutton v. Morrison, 17 Ves. 205; In re Wait, 1 Jac. & W. 608.

173 A levy on specific chattels, less than the whole, was permitted in the following cases: Fogg v. Lawry, 68 Me. 78; Phillips v. Cook, 24 Wend. (N. Y.) 389; Uhler v. Semple, 20 N. J. Eq. 288; Hershfield v. Claflin, 25 Kan. 166; Wiles v. Maddox, 26 Mo. 77; Carillon v. Thomas, 6 Mo. App. 574; Randall v. Johnson, 13 R. I. 338. See, also, Nixon v. Nash, 12 Ohio St. 647.

174 Smith v. Stokes, 1 East, 367. The sheriff cannot sell more than the debtor's interest in the goods seized. Should he undertake to sell the entire property, his act would be void, and he would be a trespasser ab initio. Atkins v. Saxton, 77 N. Y. 195. See, also, Mayhew v. Herrick, 7 C. B. 229; Ford v. Smith, 27 Wis. 261; Randall v. Johnson, 13 R. I. 338; Daniel v. Owens, 70 Ala. 297; Moore v. Pennell, 52 Me. 162; Walsh v. Adams, 3 Denio (N. Y.) 125; Lee v. Wilkins, 65 Tex. 295.

175 2 Doug. 650.

176 Rex v. Manning, Comyns, 619.

of the surplus remaining after the obligations were discharged, and that the vendee on such sale took cum onere, subject to the equities of the other partners and the creditors,[177] it became very nearly a matter of necessity for courts of law to change the practice in relation to such sales, although Lord Eldon seems to have expressed something like surprise that they should attempt to administer equity upon the subject.[178] If the several vendees of an undivided moiety of specific parcels of goods became not only tenants in common with the solvent partner, but held the share of the debtor partner in those goods, subject to a partnership account, and entitled, instead of the definite share of the goods which they had purchased, only to a share of a surplus which might exist in favor of the debtor partner upon the taking of such account, if any there happened to be, or to nothing if no surplus existed, as the case might be, and were liable to a bill in equity, in which these matters were to be adjusted, there was certainly no propriety in any longer attempting to sell an undivided share of the specific chattels on an execution at law. The reason and necessity for a change is apparent. The sheriff could no longer convey a specific share of particular goods. If he attempted to sell it, the purchaser, through the intervention of a court of equity, might find that he had taken nothing by the sale. But if the partnership was not in fact insolvent, so that a purchaser might take something, to wit, the debtor's interest in the surplus, that interest was not an undivided interest in any particular goods separated from the mass of the partnership effects; and there would be not only the evils suggested by Mr. Justice Story as reasons why an injunction should be granted to restrain the sale,[179] but a question might also arise whether, in case the goods remaining in the hands of the solvent

177 Lyndon v. Gorham, 1 Gall. 369, Fed. Cas. No. 8,640.

178 Waters v. Taylor, 2 Ves. & B. 301; Dutton v. Morrison, 17 Ves. 206. Speaking of Eddie v. Davidson, 2 Doug. 650, Lindley says (Partn. p. 357): "Lord Mansfield's innovation was therefore discontinued, and it was finally settled, in conformity with the older cases, that the sheriff's duty was, and it still is, to seize the whole of the partnership effects, or so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners." This is the rule in many American jurisdictions. Stumph v. Bauer, 76 Ind. 157. See cases cited supra, note 169.

179 1 Story, Eq. Jur. § 678. See cases cited post, p. 152, note 200.

partner were insufficient to pay the debts, the several vendees of the separate portions of the goods sold at different times on several executions were to contribute to make up the deficiency, or whether the vendees under the prior execution and sale were entitled to hold the goods, in which they had purchased a contingent interest, until those which had been delivered to subsequent vendees had been exhausted. And, if this were decided in favor of the vendees under the prior execution, a similar question might arise among them respecting a priority in the sales to themselves. There must have been a constant collision between the principles of the courts of law, thus administered, and the courts of equity, in relation to this subject, had the former continued to authorize the sale of an absolute, undivided interest in specific portions of the partnership goods upon execution, and it has been thought that such sale by the sheriff ought to be restrained by injunction.[180] If the courts of law are unable to carry out the principles of equity fully, by distributing the joint and separate effects among the joint and separate creditors, respectively, it may be well that they have been disposed to follow the principles established in chancery, so far as the nature of their proceedings will admit, leaving the equity jurisdiction to supply, as well as it may, the deficiency. The principle that the partnership effects are a fund to be applied in the first place to the payment of the partnership debts, and that the interest of each partner is only his share of the surplus after they are discharged, has accordingly been very generally recognized as a sound principle of law, and has been of very easy application where the separate and the partnership creditors were at the same time striving to satisfy their demands by a sale upon execution. Precedence has been given in such cases to the creditors of the partnership.[181] But this is not enough. Having established this principle, there seemed to be no longer any ground for authorizing the

180 Vide 1 Story, Eq. Jur. § 678; Moody v. Payne, 2 Johns. Ch. (N. Y.) 548; Gow, Partn. 144.

181 Tappan v. Blaisdell, 5 N. H. 190, and cases there cited; Barber v. Bank, 9 Conn. 410; Eighth Nat. Bank of City of New York v. Fitch, 49 N. Y. 539; Fenton v. Folger, 21 Wend. (N. Y.) 676; Dunham v. Murdock, 2 Wend. (N. Y.) 553; Crane v. French, 1 Wend. (N. Y.) 311; Dyer v. Clark, 5 Metc. (Mass.) 562; Trowbridge v. Cushman, 24 Pick. (Mass.) 310; Pierce v. Jackson, 6 Mass. 242; Crawford v. Baum, 12 Rich. Law (S. C.) 75; Bogue's Appeal, 83 Pa. St. 101; Linford v. Linford, 28 N. J. Law, 113; Commercial Bank v. Mitchell, 58

sheriff to seize and sell an undivided interest in specific portions of the goods of the partnership, upon an execution against an individual partner, even where no execution against the partnership is interposed; and the later authorities hold that he is to sell the interest of the debtor partner.[182]

"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, says: 'It is well known that at law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety or undivided share of the judgment debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner; but he can levy the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon. In short, he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all the accounts of the partnership. When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and, if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interest of the judgment debtor in the property seized. In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners, for that would be to place him in a better situation than the partner himself. But it gives him, properly speaking, a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which shall upon such settlement be ascertained to exist.'[183] This seems to be a necessary result from the adop-

Cal. 42; Burpee v. Bunn, 22 Cal. 194; Filley v. Phelps, 18 Conn. 294; Ryder v. Gilbert, 16 Hun (N. Y.) 163.

[182] See cases cited supra, note 169.

[183] 1 Story, Eq. Jur. § 677. Vide, also, Dutton v. Morrison, 17 Ves. 206; Waters v. Taylor, 2 Ves. & B. 303; Gow, Partn. 144; Crane v. French, 1 Wend. (N. Y.) 313; Scrugham v. Carter, 12 Wend. (N. Y.) 133; Church v. Knox, 2 Conn. 516; President, etc., of Commercial Bank v. Wilkins, 9 Greenl. (Me.) 28; Gibson v. Stevens, 7 N. H. 358. The purchaser takes an undivided and unascertained interest, and, as incident thereto, the right to an accounting to ascertain the interest. Clagett v. Kilbourne, 1 Black, 346; Cox v. Russell, 44 Iowa, 556; Wilson v. Strobach, 59 Ala. 488; Carter v. Roland, 53 Tex. 540. Although partner-

tion of the principle before stated. It has been repeatedly said that the creditor can have no greater right than the debtor had, and, if 'he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all the accounts of the partnership,' such interest is not an undivided interest in any particular portion of the partnership property, to be reduced into possession to the exclusion of the other partners, or sold to others.[184] One partner has no right to convert the partnership goods to his own purposes,[185] although there may be objections to sustaining an action at law if he do so.[186] Nor is it an interest which may be subdivided by the partner, and sold out to divers persons, by a sale of his interest in particular portions of the goods belonging to the partnership, and a delivery of the goods. He has no authority to make such sales, and thereby constitute his several vendees tenants in common with his co-partners in different portions of the goods. He has no authority, by an assignment of his interest, to take from the creditors or the other partners the right to have their claims against the partnership satis-

ship property has been attached or taken in execution to satisfy the claim of a creditor of one of the partners, a subsequent purchaser from the partnership will acquire an unincumbered title. Robinson v. Tevis, 38 Cal. 611; President, etc., of Commercial Bank v. Wilkins, 9 Greenl. (Me.) 28; Hill v. Wiggin, 31 N. H. 292; Staats v. Bristow, 73 N. Y. 264. Similarly, the land of a partnership may be transferred free from the incumbrance of a previous judgment against one of the partners. Kramer v. Arthurs, 7 Pa. St. 165; Lancaster Bank v. Myley, 13 Pa. St. 544; Meily v. Wood, 71 Pa. St. 488. "The corpus of the partnership effects is joint property, and neither partner separately has anything in that corpus, but the interest of each is only his share of what remains after the partnership accounts are taken." Taylor v. Fields, 4 Ves. 396. The purchaser of the execution partner's interest acquires no legal title and no right of possession to the partnership goods seized in execution. Reinheimer v. Hemingway, 35 Pa. St. 432; Barrett v. McKenzie, 24 Minn. 20. An assignee who has turned the effects of a bankrupt partnership into money is not liable in assumpsit to the judgment creditor of an individual partner, although the sheriff had, under the judgment, seized the effects prior to the commission in bankruptcy, and, by agreement that the messenger should hold for all parties, left his warrant in the latter's hands. Garbett v. Veale, 13 Law J. Q. B. 98.

184 Young v. Keighly, 15 Ves. 557.

185 Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Shirreff v. Wilks, 1 East, 48; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Gram v. Cadwell, 5 Cow. (N. Y.) 489.

186 Jones v. Yates, 9 Barn. & C. 532. See post, pp. 298, 391.

fied out of the property,[187] nor to make his assignee a partner in his stead, without the consent of his co-partners.[188] Such assignment operates as a dissolution of the partnership.[189] In cases where a partner may sell his interest, it would seem that he must sell it entire, and without excluding his co-partners from the possession; and, if the sheriff sells, he must sell, generally, the interest of the debtor in the whole concern, and not his interest in any separate portion of the property. It is admitted that the sheriff cannot sell the goods.[190] If the sheriff cannot sell an interest in specified portions of the goods of the partnership, there seems to be no reason why he should levy upon those goods, and deliver them to the vendee, or why he should in fact reduce them into possession. If 'in truth the sale does not transfer any part of the joint property so as to entitle him [the vendee] to take it from the other partner,'[191] on what principle is the sheriff authorized to seize and hold, to the exclusion of the other partners, what his vendee, after a sale of the interest of the debtor is perfected, cannot take from them? If the sheriff sells 'only the interest of such partner, and not the effects themselves,'[192] upon what ground shall he seize the effects which he is not to sell? If 'the creditors of the partnership have a preference to be paid their debts out of the partnership funds before the private creditors of either of the partners,'[193] and this 'is worked out through the equity of the partners over the whole funds,'[194] that equity should prevent them from being deprived of the means of payment by reason of such seizure by the sheriff, who can neither sell the goods nor pay the creditors, and against whom they cannot proceed so long as he may lawfully hold the goods. In Taylor v. Fields[195] Chief Baron MacDonald, in delivering the judgment of the court of exchequer, says:

187 Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 525. See post, p. 179, "Partner's Lien."

188 Murray v. Bogert, 14 Johns. (N. Y.) 318; Kingman v. Spurr, 7 Pick. (Mass.) 238. See ante, p. 74, "Delectus Personarum."

189 Marquand v. President, etc., 17 Johns. (N. Y.) 525. See post, p. 396.

190 Scrugham v. Carter, 12 Wend. (N. Y.) 131.

191 1 Story, Eq. Jur. § 677.

192 King v. Sanderson, 1 Wightw. 50, 53, cited in Moody v. Payne, 2 Johns. Ch. (N. Y.) 549.

193 Moody v. Payne, 2 Johns. Ch. (N. Y.) 549. See post, p. 273.

194 1 Story, Eq. Jur. § 675. 195 4 Ves. 396.

'The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the corpus of the partnership effects is joint property, and neither partner separately has anything in that corpus, but the interest of each is only his share of what remains after the partnership accounts are taken.' And again he remarks: 'In law there are three relations: First, if a person chooses, for a valuable consideration, to sell his interest in the partnership trade, for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference, but in all those cases the application takes place of the rule that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts.' And he says further: 'If the partner himself, therefore, had nothing more than an interest in the surplus beyond the debts of the partnership upon a division; if it turns out that at common law that is the whole that can be delivered to or taken by the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy,—all that is delivered to the creditor taking out the execution is the interest of the partner, in the condition and state he had it,' etc. In Smith's Case [196] the court, after saying that the separate creditor takes the share of his debtor in the same manner as the debtor himself had it, and subject to the rights of the other partner, add, 'The sheriff, therefore, does not seize the partnership effects themselves, for the other partner has a right to retain them for the payment of the partnership debts.' And in Crane v. French [197] Chief Justice Savage, after considering the subject, says: 'The sheriff, therefore, sells the mere right and title to the partnership property, but does not deliver possession.' [198] The conclusion that the sheriff, upon an execution against one partner, is not to deliver to his vendee, and

[196] 16 Johns. (N. Y.) 106.

[197] 1 Wend. (N. Y.) 313.

[198] Vide, also, Tappan v. Blaisdell, 5 N. H. 190; Church v. Knox, 2 Conn. 516, 517.

is not to seize the partnership effects, is sustained, therefore, not only by the reason of the thing, after the adoption of the general principle before stated, but by express authority. There is, undoubtedly, a difficulty in making a sale of the entire interest of one partner upon execution, without the aid of equity in taking an account before the sale, because ordinarily it cannot be known until an account is taken what is the value of the interest to be sold. But this difficulty cannot change the right of the creditor to have the interest of his debtor, whatever it may be, appropriated to the payment of his debt; and although, in the usual course of sales on execution, at law, no time can be given for such account after a seizure upon the execution, it is generally for the interest of both creditor and debtor that the full value should be obtained upon such sale, and this part of the matter may perhaps be well left to their superintendence and management.[199] If the interest of the debtor partner only is to be sold, there can be no reason why equity should interfere by way of injunction to restrain the sale on account of the interest of the other partners."[200]

[199] Moody v. Payne, 2 Johns. Ch. (N. Y.) 548.

[200] That an injunction will not be granted, see Moody v. Payne, 2 Johns. Ch. (N. Y.) 548; Wickham v. Davis, 24 Minn. 167; Jones v. Thompson, 12 Cal. 191; Hardy v. Donellan, 33 Ind. 501; Phillips v. Cook, 24 Wend. (N. Y.) 389. That an injunction will be granted, see Turner v. Smith, 1 Abb. Prac. N. S. (N. Y.) 304; Crooker v. Crooker, 46 Me. 250; Nixon v. Nash, 12 Ohio St. 647; Place v. Sweetzer, 16 Ohio, 142; Sutcliffe v. Dohrman, 18 Ohio, 181; Thompson v. Frist, 15 Md. 24; Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Osborn v. McBride, 3 Sawy. 590, Fed. Cas. No. 10,593; Crane v. Morrison, 4 Sawy. 138, Fed. Cas. No. 3,355. See, generally, Newhall v. Buckingham, 14 Ill. 405; Rainey v. Nance, 54 Ill. 29; Mowbray v. Lawrence, 13 Abb. Prac. (N. Y.) 317; Hubbard v. Curtis, 8 Iowa, 1; Peck v. Schultze, Holmes, 28, Fed. Cas. No. 10,895; Wiles v. Maddox, 26 Mo. 77; Scrugham v. Carter, 12 Wend. (N. Y.) 131; Parker v. Pistor, 3 Bos. & P. 288. "It is true that the execution at law only takes the interest of the partner who is sued, subject to partnership debts. * * * If those creditors can sell only subject to the joint creditors, there is no harm in suffering them to go on at law; and, if any sacrifice of interest of the separate partner is made by reason of the uncertainty, it affects only that partner who does not here raise the objection." Chancellor Kent, in a case where it was contended that partnership effects could not be sold on execution at law for a separate debt of one partner after a bill filed for a partnership account. Moody v. Payne, 2 Johns. Ch. (N. Y.) 548. "The right of the partners of the judgment debtor being of the nature described, and it being incompatible with that right that the partnership property seized by the sheriff should be removed or sold by him, the court of chan-

SAME—TRANSFER OF SHARES.

59. The transfer of a partner's share by death or otherwise does not constitute the transferee a partner, except

EXCEPTION—(a) Where the other partners consent thereto (p. 154).

(b) Where, by statute or custom, shares are assignable, as in joint-stock companies or mining partnerships (p. 154).

60. With these exceptions, the effect of a transfer is the following:

(a) Where the partnership is at will, the transfer dissolves it (p. 155).

(b) Where the partnership is for a term, the other members may treat the assignment as a cause of dissolution, but the assignment does not itself dissolve the partnership (p. 155).

(c) The transferee acquires a right to payment of what, upon taking the accounts of the partnership, may be due to his assignor (p. 155).

It has been seen that it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. This is the doctrine of delectus personarum.[201] If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners unless some agreement to that effect has been entered into by them.[202] Still less can a partner, by assigning his share, en-

cery would, before the judicature acts, on a bill filed by the judgment debtor's copartners against the judgment debtor and his creditor and the sheriff, direct the partnership accounts to be taken, and restrain the sheriff from selling the property, and appoint a receiver." Lindl. Partn. p. 360.

201 Ante, p. 74.

202 Tatam v. Williams, 3 Hare, 347; Crawshay v. Maule, 1 Swanst. 495; Gillespie v. Hamilton, 3 Madd. 254; Pearce v. Chamberlain, 2 Ves. Sr. 33.

title his assignee to take his place in the partnership, against the will of the other members.[203]

Transfer Allowed by Agreement.

Partners may agree in advance, as by their partnership agreement, that any of them shall be at liberty to introduce any other person into the partnership.[204] Those who form such partnerships, and those who join them after they are formed, consent to become partners with any one who is willing to comply with the prescribed conditions. Thus, it was said in Lovegrove v. Nelson:[205] "To make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into a partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract, which the court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

Joint-Stock Companies—Mining Partnerships.

It has been seen that the principle of delectus personarum does not apply to joint-stock companies,[206] nor to mining partnerships.[207] Mines are a peculiar species of property, and are, in some respects, governed by the doctrines of real-property law, and in others by the doctrines which regulate trading concerns. Regarding them as real property, and their owners as joint tenants or tenants in common, each partner is held to be at liberty to dispose of his inter-

[203] Bank v. Carrollton Railroad, 11 Wall. 624; Love v. Payne, 73 Ind. 80; Meaher v. Cox, 37 Ala. 201; Merrick v. Brainard, 38 Barb. (N. Y.) 574; Setzer v. Beale, 19 W. Va. 274; Jefferys v. Smith, 3 Russ. 158.

[204] Mayhew's Case, 5 De Gex, M. & G. 837; Fox v. Clifton, 9 Bing. 119; Jefferys v. Smith, 3 Russ. 158; McGlensey v. Cox, 1 Phila. (Pa.) 387. As to ratification and acquiescence in transfer, see Love v. Payne, 73 Ind. 80; Rosenstiel v. Gray, 112 Ill. 282; Meaher v. Cox, 37 Ala. 201; Mason v. Connell, 1 Whart. (Pa.) 381; Wood v. Connell, 2 Whart. (Pa.) 542; Tabb v. Gist, 1 Brock. 33, Fed. Cas. No. 13,719; Buckingham v. Hanna, 20 Ind. 110.

[205] 3 Mylne & K. 1–20.

[206] See ante, p. 75.

[207] Id.

est in the land without consulting his co-owners;[208] and a transfer of this interest confers upon the transferee all the rights of a part-owner, including a right to an account against the other owners.[209] But even here, if the persons originally interested in the mine are not only part owners, but also partners, a transferee of the share of one of them, although he would become a part owner with the others, would not become a partner with them, in the proper sense of the word, unless by agreement, express or tacit.[210]

Ships.

Similar observations apply to transfers of shares in ships.[211]

Effect of Transfer—As Regards Dissolution.

The effect of the transfer of a partner's share, as regards a dissolution, has already been considered in connection with the doctrine of delectus personarum.[212] Where the partnership is at will, the transfer dissolves it.[213] Where the partnership is for a term, the other members may treat the assignment as a cause for dissolution, but the assignment does not itself dissolve the partnership.[214]

Same—As Regards Accounting.

Although a partner cannot, by transferring his share, force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his co-partners; and, if a partner does assign or mortgage his share, he thereby confers upon the assignee or mortgagee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor.[215] But the assignee or mortgagee acquires no other

208 Kahn v. Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851; Duryea v. Burt, 28 Cal. 569; Taylor v. Castle, 42 Cal. 367.

209 See Bentley v. Bates, 4 Younge & C. 182; Redmayne v. Forster, L. R. 2 Eq. 467.

210 As in Jefferys v. Smith, 3 Russ. 158. And see Crawshay v. Maule, 1 Swanst. 518.

211 Lindl. Partn. p. 366; ante, c. 1, notes 21, 22.

212 See ante, p. 74. See, also, post, p. 397.

213 Bates, Partn. § 162; Lindl. Partn. p. 363. See Heath v. Sansom, 4 Barn. & Adol. 172, and post, p. 397.

214 See post, p. 393.

215 Whetham v. Davey, 30 Ch. Div. 574; Glyn v. Hood, 1 Giff. 328; Bank v.

right than this,[216] and he takes subject to the rights of the other partners, and will be affected by equities arising between the assignor and his co-partners subsequently to the assignment.[217] Even if the assignee gives notice of the assignment, he cannot, if the partnership is for a term, acquire a right to the assignor's share as it stands at the time of the assignment or notice, discharged from subsequently arising claims of the other partners.[218] The assignment cannot deprive them of their right to continue the partnership, and consequently to bring subsequent dealings and transactions into account. It seems, however, that an assignee of a share in a partnership can compel the other partners to come to an account with him.[219]

Carrollton Railroad, 11 Wall. 624. The assignee acquires the interest of the selling partner, without the rights of membership. He is entitled to a dissolution and account to determine his interest. Clagett v. Kilbourne 1 Black, 346; Bank v. Carrollton Railroad, 11 Wall. 624; Fellows v. Greenleaf, 43 N. H. 421; Miller v. Brigham, 50 Cal. 615.

[216] Smith v. Parkes, 16 Beav. 115.

[217] See Cavander v. Bulteel, 9 Ch. App. 79; Lindsay v. Gibbs, 3 De Gex & J. 690; Lindl. Partn. p. 364.

[218] See Bergmann v. MacMillan, 17 Ch. Div. 423; Cavander v. Bulteel, 9 Ch. App. 79; Kelly v. Hutton, 3 Ch. App. 703; Redmayne v. Forster, L. R. 2 Eq. 467.

[219] See Whetham v. Davey, 30 Ch. Div. 574.

CHAPTER IV.

IMPLIED RIGHTS AND LIABILITIES INTER SE.

61. Right to Participate in Management.
62–64. Rights and Powers of Majority.
65. Duty to Exercise Care and Skill.
66. Duty to Observe Good Faith.
67. Right to Benefits from Transactions Concerning Firm Interests.
68. Right to Compete with Firm.
69. Right to Benefits Resulting from Connection with Firm.
70. Right to Compensation for Services.
71–72. Right to Interest on Balances.
73. Right of Partner to Indemnity and Contribution.
74. Duty to Conform to Agreement.
75. Right to Information as to Conduct of Business.
76. Duty to Keep, and Right to Inspect, Accounts.
77–79. Right to have Partnership Property Applied to Partnership Debts—Partner's Lien.
80–81. Division of Profits.

RIGHT TO PARTICIPATE IN MANAGEMENT.

61. Unless there has been an express mutual agreement to the contrary, all the members of a partnership have equal rights as to the management of the firm business.

It is to be presumed always that one partner has as great rights as another respecting the carrying on of the business of the partnership,[1] but, as a matter of fact, their rights in this respect are not thus always equal. The partners may stipulate among themselves that one of them shall have control over one department of the business, and another over another department. Indeed, they may stipulate to the effect that one or more of their number shall have no part in the business management at all. Such a stipulation is perfectly valid, and may be enforced against the partner

1 Lloyd v. Loaring, 6 Ves. 777; Rowe v. Wood, 2 Jac. & W. 558; Marshall v. Colman, Id. 266; Goodman v. Whitcomb, 1 Jac. & W. 589.

who has by it relinquished his right.[2] On the other hand, if a partner is excluded from the management of the common business by his co-partners in the absence of such stipulation, he, too, may have appropriate redress upon his seeking it and making out a proper case. The courts are open to the partners in both the situations mentioned, that their rights under their existing agreement may be maintained.[3]

RIGHTS AND POWERS OF MAJORITY.

62. Where differences arise as to matters in the ordinary course of the partnership business, they are to be decided by a majority of the partners; but the decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority, and all the partners must be consulted.

63. This rule extends to powers conferred on a majority of the partners by express agreement.

64. No change can be made in the nature of the partnership business except with the consent of all the partners.

The partnership articles ought to provide expressly just what weight is to be accorded the desires of a majority in cases of differences among the partners. If there is no such provision made, the power of the majority depends on the emergency which develops the difference; for if the point is one affecting the legitimate business of the firm, and the method of carrying it on, a different rule applies than would apply to a case where the point has reference to some proposed departure from the strict line of such business. In the latter case there is no ruling power in the majority at all.[4] In the former case the majority rules the mi-

[2] 1 Lindl. Partn. 302.

[3] Goodman v. Whitcomb, 1 Jac. & W. 589; Marshall v. Colman, 2 Jac. & W. 266.

[4] Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Jennings' Appeal (Pa. Sup.)

nority,[5] if they act in good faith[6] and all have been consulted.[7] But, when there is an equal division in sentiment in regard to any partnership concern, those partners opposed to the introduction of change in the old routine always prevail over the others.[8] The majority here referred to is the majority so far as numbers are concerned, and not a majority in respect of the contributions to the capital of the partnership.[9] The voice of the majority will not prevail, however, when exercised in a merely captious spirit, and, where it appears that there had been on the part of the many a disposition to oppose the few for no reason other than mere contrariety, a court of equity will not give effect to the majority decision.[10] The majority cannot, in the face of objection by the minority, delegate to a manager the right to sign the firm name.[11] Nor can it decide where the business of the partnership is to be carried on after the expiration of the lease of the premises where the business has been habitually carried on heretofore.[12] The question as to the particular times when division of profits shall be had, and the amount of profits that shall be divided at any given time, are in the hands of the majority to decide, always, unless otherwise provided for by agreement.[13]

16 Atl. 19; Zabriskie v. Railroad Co., 18 N. J. Eq. 178; Kean v. Johnson, 9 N. J. Eq. 401; Abbot v. Johnson, 32 N. H. 9.

[5] Faulds v. Yates, 57 Ill. 416; Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 400; Waterbury v. Express Co., 50 Barb. (N. Y.) 157, 168; Peacock v. Cummings, 46 Pa. St. 434; Western Stage Co. v. Walker, 2 Iowa, 504; Zabriskie v. Railroad Co., 18 N. J. Eq. 178. Cf. Irvine v. Forbes, 11 Barb. (N. Y.) 587.

[6] Blisset v. Daniel, 10 Hare, 493; Const v. Harris, Turn. & R. 496, 525.

[7] Western Stage Co. v. Walker, 2 Iowa, 504; Const v. Harris, Turn. & R. 496, 525.

[8] Johnston v. Dutton's Adm'r, 27 Ala. 245. And see Donaldson v. Williams, 1 Cromp. & M. 345.

[9] Story, Partn. § 123.

[10] Lord Eldon in Const v. Harris, Turn. & R. 496, 526.

[11] Beveridge v. Beveridge, L. R. 2 H. L. Sc. 183.

[12] Clements v. Norris, 8 Ch. Div. 129.

[13] Stevens v. Railway Co., 9 Hare, 313; Stupart v. Arrowsmith, 3 Smale & G. 176; Robinson v. Thompson, 1 Vern. 465.

DUTY TO EXERCISE CARE AND SKILL.

65. A partner's act, done in the firm name and within the scope of its business, does not render him liable to his co-partners, though it results in a loss, provided

PROVISO—(a) He acted in good faith, and

(b) He exercised reasonable skill and diligence.

A partner, like any other agent, must exercise reasonable care, skill, and diligence in the conduct of the firm's business. For any loss caused by default in this respect he is liable to his co-partners, just as any agent is liable to his principal for a loss caused by his negligence. But a partner is not liable for losses that have resulted merely from his lack of discretion or good judgment. Thus, a partner who, without the consent of his co-partner, leases property for the use of the firm, is not liable, on dissolution of the partnership, to his co-partner for loss occasioned by such lease, though he acted unwisely, where his conduct was not fraudulent or wanton.[14]

DUTY TO OBSERVE GOOD FAITH.

66. Partnership is a relation of trust and confidence, and the partners must at all times conduct themselves with perfect good faith towards each other.

The utmost good faith is due from every member of a partnership towards every other member, and, if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he must show that his conduct conforms to the highest standard of honor.[15] Thus, if one partner knows more about a state of the partnership accounts than another, and, concealing what he knows, enters into an agreement with that other relative to some matter as to which a knowledge

[14] Charlton v. Sloan, 76 Iowa, 288, 41 N. W. 303.

[15] Goodwin v. Einstein, 51 How. Prac. (N. Y.) 9; Comstock v. Buchanan, 57 Barb. (N. Y.) 127; Bentley v. Craven, 18 Beav. 75.

of the state of accounts is material, such agreement will not be allowed to stand.[16]

This obligation to perfect fairness and good faith is not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists;[17] and also to persons who have dissolved partnership, but who have not completely wound up and settled the partnership affairs;[18] and most especially is good faith required to be observed when one partner is endeavoring to get rid of another, or to buy him out.[19]

Notwithstanding the universal application to partners of the rule requiring perfect good faith, if one partner repudiates the contract of partnership, and will not perform his duty towards his co-partners, he cannot justly complain if they, in return, decline to treat him on a footing of equality with themselves.[20] As observed by Lord Eldon in Const v. Harris,[21] "A partner who complains that the other partners do not do their duty towards him must be ready at all times and offer himself to do his duty towards them." But if a partner has been set at defiance by his co-partners; if they have denied that he is a partner, and that he has any right

[16] Maddeford v. Austwick, 1 Sim. 89. And see Blisset v. Daniel, 10 Hare, 493, 522; Cassels v. Stewart, 6 App. Cas. 64.

[17] Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Fawcett v. Whitehouse, 1 Russ. & M. 132; Hichens v. Congreve, Id. 150.

[18] Betts v. June, 51 N. Y. 274; Jones v. Dexter, 130 Mass. 380; Beam v. Macomber, 33 Mich. 127; Warren v. Schainwald, 62 Cal. 56; Lees v. Laforest, 14 Beav. 250; Clegg v. Fishwick, 1 Macn. & G. 294.

[19] Chandler v. Dorsett, Finch. 431; Blisset v. Daniel, 10 Hare, 493; Maddeford v. Austwick, 1 Sim. 89. But see Geddes' Appeal, 80 Pa. St. 442; Bradbury v. Barnes, 19 Cal. 120. Cigarette manufacturers purchased the interest of their partner, concealing from him the existence of a contract by which the patentee of a cigarette making machine had granted the firm the use of his machines at a much lower rate than was given other manufacturers, thereby greatly increasing the profits of the firm; and knowledge of such contract could not have been acquired by an inspection of the partnership books. *Held*, that the retiring partner could maintain an action for deceit. Wright v. Duke, 91 Hun, 409, 36 N. Y. Supp. 853.

[20] Reilly v. Walsh, 11 Ir. R. Eq. 22; McLure v. Ripley, 2 Macn. & G. 274.

[21] Turn. & R. 496, 524.

to interfere in the partnership,—they can derive no advantage from the circumstance that he has not performed his duty to them.[22]

SAME—RIGHT TO BENEFITS FROM TRANSACTIONS CONCERNING FIRM INTERESTS.

67. Benefits arising from a transaction concerning firm interests, intended by the partner to accrue to himself only, accrue to his partner as well as to himself.

The purchase by one partner of property of any kind, in which the partnership is concerned, may be regarded as a purchase for the firm, and each co-partner is entitled to his share in it, upon his reimbursing the purchasing partner to that extent.[23] Where two persons were partners at will, and one of them brought his son into the firm, and then, in contemplation of forming a partnership between his son and himself exclusively, renewed, in the name of the contemplated firm, a lease of property upon which the present firm enjoyed a lease existing, and thereafter, for the first time, notified the other partners of his intention to dissolve the present partnership, it was held that the lease was renewed for all the partners, and not only for those for whom the renewal was expressly made.[24] But there was a much stronger case in New York, determined in a similar manner. There the partnership had been formed to come to an end on a day certain, and the lease had been made to terminate on the same day; but, because one partner had, without his co-partners' knowledge, taken a lease in his own name, the court held him to be in so far a trustee for the firm.[25] Lindley goes so far as to intimate[26] that a partner, by his act in availing himself of an opportunity to acquire for his own, as he thinks, something that he ought, in duty to his firm, to acquire for it, if at all,

22 Dale v. Hamilton, 2 Phil. Ch. 276.

23 Anderson v. Lemon, 8 N. Y. 236.

24 Featherstonhaugh v. Fenwick, 17 Ves. 298.

25 Mitchell v. Reed, 61 N. Y. 123. And see Struthers v. Pearce, 51 N. Y. 357; Anderson v. Lemon, 8 N. Y. 236; Johnson's Appeal (Pa. Sup.) 8 Atl. 36.

26 Partn. 307.

makes the acquisition for the firm, in spite of himself, if his co-partners see fit to have it so; but he cannot renew a lease, and require his co-partners to make the act a firm one, against their wills, without an agreement between them giving him that right.[27] It should be stated in this connection that the rule requiring benefits acquired clandestinely to inure to the firm, rather than to the partner seeking them for his own, does not necessarily apply to the case of an acquisition of property by a partner after dissolution of the firm.* Where, of two partners, brother and sister, the latter had regularly carried on the business, the brother being abroad almost all the while, and then had married after a while, and had thereafter continued in the same business, and had purchased property for its purposes, such property was held to belong to her solely.[28] When to one of two partners was committed the duty of purchasing for the firm, in the line of their business, a commodity obtained from a mine in the neighborhood of a store which he ran as an individual enterprise, and he, without the privity of his co-partner, paid for the commodity in goods from his store, as of their market price, it was held that he could not retain the profits on his goods so disposed of, but must account to the firm for all the difference between such price and the original cost of the goods to him.[29] Except by consent of the firm, a partner may not profit by any transaction between himself and his firm. Thus, where a partner furnished to his firm, at the then prevailing market price, goods which he had previously obtained at a lower price, he was not allowed to enjoy the profit unshared by his co-partners;[30] and where partners had agreed that property purchased by them to sell again should be sold to a person named, and for a named sum, and one of the partners sold it, for a larger sum, to a company in which he had an interest, it was held that both partners should partici-

27 Clements v. Norris, 8 Ch. Div. 129.

*Pierce v. McClellan, 93 Ill. 245; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; Nerot v. Burnand, 4 Russ. 247; Payne v. Hornby, 25 Beav. 280. But see Spiess v. Rosswog, 63 How. Prac. (N. Y.) 401.

28 Nerot v. Burnand, 4 Russ. 247.

29 Burton v. Wookey, 6 Madd. 367.

30 Bentley v. Craven, 18 Beav. 75.

pate in the whole profits.[31] It is unnecessary to say that a partner need not account to his firm for a benefit, personal to himself, received outside the affairs of the partnership; but neither need he account for such a benefit received inside the partnership affairs, if it was intended for him only.[32]

SAME—RIGHT TO COMPETE WITH FIRM.

68. A partner may not compete with his firm in a matter of business. If he does so without consent of the other partners, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

"It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a position which gives him a bias against the due discharge of that trust or confidence."[33] One of the members of a firm engaged in the conduct of a newspaper procured an item for publication in that paper, which item his co-partners, who were engaged in the conduct of another paper also, got hold of and published, without his consent, in the latter paper before it could be published in the former. Commenting on these facts, the court said, "The principles of courts of equity will not permit that parties bound to each other, by express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gives them a direct interest adverse to that undertaking." For example, there is necessarily some degree of rivalry between a morning and an evening paper.[34]

[31] Dunne v. English, L. R. 18 Eq. 524.

[32] Campbell v. Mullett, 2 Swanst. 551; Moffatt v. Farquharson, 2 Brown, Ch. 338.

[33] See Sir John Leach in Burton v. Wookey, 6 Madd. 367, 368.

[34] Glassington v. Thwaites, 1 Sim. & S. 133.

SAME—RIGHT TO BENEFITS RESULTING FROM CONNECTION WITH FIRM.

69. A partner may not carry on, for his individual profit, a business which, but for his connection with the firm, he would not have been able to secure.

A partner, moreover, is not allowed, in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business, which, were it not for his connection with the partnership, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labor for himself to their detriment; and, if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretense that it arose from a separate transaction with which the firm had nothing to do. This is well exemplified by the cases as to renewed leases which have been already referred to.[35] Where, of two co-owners of a ship, partners in the business of trading and carrying, one of them availed himself of his being master of the ship to trade on his own account also, he was required to share the profits thus made, just as if they had been intended for the partnership,[36] although the master claimed that he had used only his private capital in earning them.

But there is no restraint upon a partner's right to engage in a business in all respects distinct from that of the partnership, and to enjoy alone the profits of it; and this, so Lindley says,[37] "even if he has agreed not to carry on any separate business."

RIGHT TO COMPENSATION FOR SERVICES.

70. Unless otherwise agreed, a partner's services for his firm do not call for compensation.

In order that a partner may exact payment from the firm for any services done by him on its behalf, there must have been some agree-

[35] 1 Lindl. Partn. 310.

[36] Gardner v. M'Cutcheon, 4 Beav. 534.

[37] Lindl. Partn. p. 312; Russell v. Austwick, 1 Sim. 52; Miller v. Mackay, 34 Beav. 295.

ment between the partners entitling him to compensation.[38] And, without agreement of this kind, he has generally no right to compensation, even though he may have been more active than his copartners in pushing the enterprise in which they are all concerned as partners, unless such a difference in extent or importance between the several services of the partners was clearly not contemplated by the latter previously;[39] for if one partner, while bound,

[38] Thompson v. Noble (Mich.) 65 N. W. 563; Denver v. Roane, 99 U. S. 355; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Chamberlain v. Sawyers (Ky.) 32 S. W. 475. It is the duty of partners to devote their time to carrying on the firm business, and, in the absence of special agreement, they are not entitled to compensation therefor. Insley v. Shire, 54 Kan. 793, 39 Pac. 713. A provision in partnership articles that the salaries of the members shall not be considered as losses sustained by the business, entitles a partner to his salary unconditionally. Keiley v. Turner, 81 Md. 269, 31 Atl. 700. Articles of partnership prescribed three years for the continuance of the firm, and provided salaries for the members. The partnership continued after that time without new articles, and the partners subsequently ceased to make entries of salaries on the firm's books. Held that, in settling the firm accounts, the members are not entitled to salaries after the last entry thereof. Id. Articles of partnership provided that one partner should receive $450 per month as salary, the second $300, and the third nothing. The first and third partners agreed that the latter should draw, and have charged to him on the partnership books, $150 per month of the former's salary. Held that, in settling the firm accounts, the former is entitled to but $300 per month as against the firm assets, his recourse for the balance being against the third partner. Id. See, also, Smith v. Knight, 88 Iowa, 257, 55 N. W. 189. P. and C. were partners, each owning, as between themselves, a half interest, under articles requiring each to devote all his time to the firm business, for which he should receive no compensation save his share of the profits. As between plaintiff and C., however, plaintiff owned a certain interest in C.'s half interest. Held that, as against plaintiff, C. was not entitled to compensation for his services in the business, there being no agreement between them therefor. Eckert v. Clark, 14 Misc. Rep. 18, 35 N. Y. Supp. 118. See, also, Keiley v. Turner, 81 Md. 269, 31 Atl. 700. Where a partnership contract provided that each member was to render services, and it appeared, on a settlement, that one partner had furnished all the capital, and had exercised complete management and control over the firm affairs, it was proper to allow him credit for his services. Mattingly v. Stone's Adm'r (Ky.) 35 S. W. 921.

[39] Dunlap v. Watson, 124 Mass. 305; Beatty v. Wray, 19 Pa. St. 516; Gilhooly v. Hart, 8 Daly (N. Y.) 176; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Caldwell v. Leiber, 7 Paige (N. Y.) 483; Drew v. Ferson, 22 Wis. 651; Heath v. Waters, 40 Mich. 457; King v. Hamilton, 16 Ill. 190. A partner cannot recover of the firm for the value of services rendered to it in excess of the

under the terms of their contract, to co-operate with the other, purposely neglects the business, leaving it to the care altogether of his co-partner, the latter is entitled to something more than his mere proportion of profit.[40] Where it has been expressly agreed between the partners that one of them is to receive compensation for giving his personal attention to the business, the person thus agreed to be compensated may enforce his demand for compensation, after having earned it, against the others.[41] But, even where there has been no such agreement, a surviving partner, who gives the business the benefit of his personal attention after dissolution of the partnership is, in England, entitled to compensation,[42] unless there is some reason why he should serve without compensation,—if, for instance, he is the executor of the deceased partner,[43] or is the co-partner of a person who has become insane, on account of whose insanity the dissolution has been decreed.[44] In the United States, however, by the weight of authority, a liquidating partner is not entitled to compensation for services performed in winding up, unless there is a provision in the partnership articles for compensation for such services.[45] An agreement to compensate a partner for services

extent of services rendered by his co-partner, in the absence of special agreement. Heckard v. Fay, 57 Ill. App. 20. Where one member of a law firm renders services for the estate of which his partner is the executor, at his request, such services are not within the partnership business, and the executor is liable to him for compensation therefor. But services rendered by a lawyer, at the request of his partner, to an estate of which the partner is executor, will be held to have been performed for the benefit of the firm, where payments on account of such services were entered on the books as partnership funds, and divided between the partners, and the executor is not liable on account of such services. 9 Misc. Rep. 298, 30 N. Y. Supp. 267, reversed. Parker v. Day, 12 Misc. Rep. 510, 33 N. Y. Supp. 676.

40 Denver v. Roane, 99 U. S. 355; Marsh's Appeal, 69 Pa. St. 30; Airey v. Borham, 29 Beav. 620.

41 Paine v. Thacher, 25 Wend. (N. Y.) 450.

42 1 Lindl. Partn. 381, citing Featherstonhaugh v. Turner, 25 Beav. 382; Brown v. De Tastet, Jac. 284; Crawshay v. Collins, 2 Russ. 347.

43 Featherstonhaugh v. Turner, 25 Beav. 382.

44 Mellersh v. Keen, 27 Beav. 242.

45 Denver v. Roane, 99 U. S. 355, 359; Dunlap v. Watson, 124 Mass. 305; Washburn v. Goodman, 17 Pick. (Mass.) 519; Schenkl v. Dana, 118 Mass. 236; Coursen v. Hamlin, 2 Duer (N. Y.) 513; Burgess v. Badger, 82 Hun, 488,

may be implied. "Where it can be fairly and justly implied, from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained." [46]

RIGHT TO INTEREST ON BALANCES.

71. On an accounting between partners, interest should not be allowed, in the absence of agreement, upon advances, overdrafts, or undivided profits allowed to remain in the business.

72. Interest should be charged upon the amount of an unpaid subscription to capital, and wherever there is an express or an implied agreement to pay it.

There is considerable confusion and conflict in the cases upon the right to interest upon balances found due upon a partnership accounting. Indeed, it has been frequently said that the allowance or disallowance of interest in taking partnership accounts depends upon the circumstances of each particular case, and cannot be governed by any fixed rules.[47] There is probably no question in English law upon which the cases are in greater conflict than they are upon the question of interest. It is believed, however, that the rules stated above will be found based on sound principles, and supported by the weight of authority. Interest is allowed only on one of two grounds: Where there is a contract to pay interest, it is recoverable because it is a debt. Where there has been a default in paying money at the time it was due, interest is allowed as damages for the delay.[48] Examining the question under consideration in the light of these two principles, the following conclusions seem justifiable:

31 N. Y. Supp. 614; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Kimball v. Lincoln, 5 Ill. App. 316; Brown's Appeal, 89 Pa. St. 139; Beatty v. Wray, 19 Pa. St. 516.

[46] Emerson v. Durand, 64 Wis. 111, 118, 24 N. W. 129, and 54 Am. Rep. 593.

[47] Buckingham v. Ludlum, 29 N. J. Eq. 350; Gyger's Appeal, 62 Pa. St. 79; Johnson v. Hartshorne, 52 N. Y. 173.

[48] Hale, Dam. 144.

Interest cannot be recovered upon contributions to capital, in the absence of express contract. No contract to pay interest can be implied, because the fair inference is that the contributions of the partners balance each other, and each receives compensation in his share of the profits. Interest cannot be given as damages, because there has been no default,—no wrong for which damages can be awarded.[49]

Where, however, a partner has failed to pay in the full amount of his agreed contribution to the capital, interest will be allowed against him on the amount of the unpaid balance, as damages, because he is in default in not paying the money when it was due.[50]

Interest will not be allowed upon advances, overdrafts, or undivided profits, in the absence of an agreement, express or implied, to that effect; i. e. it will not be allowed as damages. The reason for this is very clear. It is because there has been no default for which damages can be awarded. As a general rule, there is no duty to pay money until the amount to be paid is ascertained; and there can be no default, therefore, unless the amount is liquidated, or it is the debtor's fault that it is not liquidated. Undivided profits are not payable until there has been an accounting and a settlement. There can be no default, therefore, in not paying them sooner, and consequently interest cannot be allowed as damages.[51]

[49] Moss v. McCall, 75 Ill. 190; Gilhooly v. Hart, 8 Daly (N. Y.) 176; Bradley v. Brigham, 137 Mass. 545; Whitcomb v. Converse, 119 Mass. 38; Brown's Appeal, 89 Pa. St. 139; Cooke v. Benbow, 3 De Gex, J. & S. 1. But see Lloyd v. Carrier, 2 Lans. (N. Y.) 364; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, and 27 N. W. 575; Pratt v. McHatton, 11 La. Ann. 260. Interest is not recoverable on an excess of capital contributed to a partnership by one partner on the ground that he devoted his time and money to carrying on the partnership business, whereas the other partner contributed nothing in the way of time or labor. Thompson v. Noble (Mich.) 65 N. W. 563.

[50] Ligare v. Peacock, 109 Ill. 94; Hartman v. Woehr, 18 N. J. Eq. 383; Reynolds v. Heirs, etc., 17 Ala. 32; Krapp v. Aderholt, 42 Kan. 247, 21 Pac. 1033. But see Stokes v. Hodges, 11 Rich. Eq. (S. C.) 135; Montague v. Hayes, 10 Gray (Mass.) 609.

[51] Gilman v. Vaughan, 44 Wis. 646; Sweeney v. Neely, 53 Mich. 421, 19 N. W. 127; Moss v. McCall, 75 Ill. 190; Gage v. Parmelee, 87 Ill. 329; Brown's Appeal, 89 Pa. St. 139; President, etc., of Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587; Bowling's Heirs v. Dobyns' Adm'r, 5 Dana (Ky.) 434; Buck-

For a similar reason, interest, as damages, is not allowed upon advances, or charged upon overdrafts.[52] Such transactions simply constitute items in the account between the partners making them and the firm. They are not isolated acts. Until an accounting, it cannot be known whether the partner is a creditor or a debtor.[53] It seems reasonably clear, therefore, that, in all this class of cases, interest cannot be allowed as damages.

Interest is allowed on advances, overdrafts, and unwithdrawn profits, as a part of the debt, whenever there is a contract to pay it. This contract may be either express or implied.[54] The principal

ingham v. Ludlum, 29 N. J. Eq. 345; Dexter v. Arnold, 3 Mason, 284, Fed. Cas. No. 3,855.

[52] T. Pars. Partn. § 417; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Prentice v. Elliott, 72 Ga. 154; Clark v. Worden, 10 Neb. 87, 4 N. W. 413. An advancement or loan by a partner to a firm bears interest. Matthews v. Adams (Md.) 35 Atl. 60. Where a partner advances his own funds to meet firm obligations, he is entitled, on an accounting with his co-partners, to be credited with interest from the date of the advancement. Coldren v. Clark (Iowa) 61 N. W. 1045. Where a partner left the monthly installments of his salary in the hands of the firm, to be used for its benefit, in settling the partnership accounts he is entitled to interest on the several installments from the time each became payable to him. Keiley v. Turner (Md.) 31 Atl. 700.

[53] Miller v. Lord, 11 Pick. (Mass.) 11; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Prentice v. Elliott, 72 Ga. 154. After disssolution of a partnership, and prior to the settlement, one partner is not entitled to interest from the other partners on undetermined balances in his favor. Ashbrook v. Ashbrook (Ky.) 28 S. W. 660. Where a partner failed to seek an accounting until after the lapse of 15 to 20 years, and the means of showing the true state of the account have been lost, equity will not allow him to recover interest on the balance due him. Smith v. Smith, 18 R. I. 722, 30 Atl. 602. See, also, Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Smith v. Knight, 88 Iowa, 257, 55 N. W. 189.

[54] Lloyd v. Carrier, 2 Lans. (N. Y.) 364; Payne v. Freer, 91 N. Y. 43; Baker v. Mayo, 129 Mass. 517; Montague v. Hayes, 10 Gray (Mass.) 609; Bradley v. Brigham, 137 Mass. 545; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, and 27 N. W. 575; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129; Morris v. Allen, 14 N. J. Eq. 44; Coddington v. Idell, 29 N. J. Eq. 504. The partnership may be liable for interest to one partner who makes advances for or to the firm, where there is a special contract to that effect, or where it may be implied from the facts and circumstances that the firm was to pay interest for such advances; otherwise, the partner will not be entitled to interest for such advances or payments, but the liability of the firm will be by account. Prentice v. Elliott, 72 Ga. 154. The

difficulty is in determining when such a contract will be implied. It is apprehended that the judges and text writers, when they say that the question of interest cannot be determined by any rule of law, but depends solely upon the facts, mean no more than that no fixed rule can be laid down as to when a contract to pay interest will be implied. This does, indeed, depend on the facts of each particular case. It may be implied from a course of dealing between the partners,—as, for instance, a long-continued custom to allow interest on advances.[55]

RIGHT OF PARTNER TO INDEMNITY AND CONTRIBUTION.

73. Every partner is entitled to be indemnified in account with the firm for payments made and for personal liabilities incurred by him

(a) In the ordinary and proper conduct of the business of the firm.

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

period of the dissolution of the partnership is the proper time to make a rest, and adjust the accounts, and the partner against whom the balance is found is chargeable with interest. Andrews v. Andrews, 3 Bradf. Sur. (N. Y.) 101; Johnson v. Hartshorne, 52 N. Y. 178. As a general rule, interest is not allowed upon partnership accounts until after a balance is struck on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns. Gilman v. Vaughan, 44 Wis. 649; Dexter v. Arnold, 3 Mason, 284, Fed. Cas. No. 3,855; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Day v. Lockwood, 24 Conn. 185; Desha v. Smith, 20 Ala. 747; Whitcomb v. Converse, 119 Mass. 38; Beacham's Assignees v. Eckford's Ex'rs, 2 Sandf. Ch. (N. Y.) 116, 7 N. Y. Ch. (Lawy. Ed.) 531. Interest will not be allowed to a member of a partnership on advances and unwithdrawn profits left with the firm unless it is provided for in the partnership articles, or is in accordance with the understanding of the parties. Winchester v. Glazier (Mass.) 25 N. E. 728.

[55] See Eddowes v. Hopkins, 1 Doug. 376; Selleck v. French, 1 Conn. 32; Moore v. Voughton, 1 Starkie, 487. Where the only agreement between partners shown is that one is to have a fifth of the profits and a fifth of the losses, the fact that, in making up previous accounts between them, the other had been credited with interest on his capital, is not sufficient evidence of usage to dispense with proof of a special agreement therefor. In re James, 40 N. E. 876, 146 N. Y. 78.

Generally speaking, every partner is the agent of the firm for the conduct of its business, and, as such, is entitled to indemnity, on the ordinary principles of the law of agency.[56] But the rights of a partner to contribution go beyond this. He may charge the firm with moneys necessarily expended by him for the preservation or continuance of the partnership concern.[57] This right must be carefully distinguished from the power of borrowing money on the credit of the firm, of which it is altogether independent.[58] It arises only where a partner has incurred expense which, under the circumstances, and having regard to the nature of the business, was absolutely necessary, and the firm has had the benefit of such expense,[59] as where the advances are made to meet immediate debts of the firm (which is the most frequent case),[60] or to pay the cost of operations without which the business cannot go on, such as sinking a new shaft when the original workings of a mine are exhaust-

[56] Thomas v. Atherton, 10 Ch. Div. 185; Spottiswoode's Case, 6 De Gex, M. & G. 345; Robinson's Ex'rs Case, Id. 572; Lefroy v. Gore, 1 Jones & L. 571; Bury v. Allen, 1 Colly. 604.

[57] Harvey v. Varney, 104 Mass. 436; King v. Hamilton, 16 Ill. 190; Stegman v. Berryhill, 72 Mo. 307; Savage v. Carter, 9 Dana (Ky.) 408; Coddington v. Idell, 29 N. J. Eq. 504; Ex parte Chippendale, 4 De Gex, M. & G. 19; Burdon v. Barkus, 4 De Gex, F. & J. 42.

[58] See post, p. 228, and Ex parte Chippendale, 4 De Gex, M. & G. 35, 40.

[59] Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Rodes v. Rodes, 6 B. Mon. (Ky.) 400; Zimmerman v. Huber, 29 Ala. 379. There is no right to contribution for unnecessary expenditures. Meserve v. Andrews, 106 Mass. 419; Lee's Ex'x v. Dolan's Adm'x, 39 N. J. Eq. 193; Tomlinson v. Ward, 2 Conn. 396.

[60] Wheeler v. Arnold, 30 Mich. 304; Downs v. Jackson, 33 Ill. 465; Brown v. Agnew, 6 Watts & S. (Pa.) 235; Noel v. Bowman, 2 Litt. (Ky.) 46; Dakin v. Graves, 48 N. H. 45; Ex parte Williamson, 5 Ch. App. 309; Olleman v. Reagan's Adm'r, 28 Ind. 109. But see Phillips v. Blatchford, 137 Mass. 510. A partner who takes exclusive possession and control of the assets of the firm on its dissolution, and undertakes to close up the business, is not entitled to contribution from a partner for firm debts paid by him, without making a settlement of partnership accounts. Smith v. Zumbro (W. Va.) 24 S. E. 653. A note was given by a firm. On dissolution of the firm by arbitration, in which the note was expressly excluded, one partner assumed all its liabilities, retaining the assets, and was required to pay the note. *Held* that, if the note was a firm liability, he could not recover one-half the amount so paid from his co-partner. Neal v. Berry, 86 Me. 193, 29 Atl. 987. See, also, Compton v. Thorn, 90 Va. 653, 19 S. E. 451.

ed.[61] If, in the presence of some such urgent necessity that money shall be paid for the firm's benefit, one partner comes forward and expends his own private means to that end, the right accrues to him, immediately, that the other partners shall reimburse him, so that the whole eventual loss to the partner paying shall be equal to what would have been his proportion of loss if all had paid, instead of him only. But it is not to be inferred from this that necessarily each partner must pay merely according to his share in the partnership, because some one or more partners might not be able to pay at all, in which case the first person above mentioned would sustain a loss proportionate to the joint shares of himself and those unable to pay.[62] This right is called the "right to contribution." Although it is often expressly recognized in the articles of partnership, it exists without regard to the contract, as one of the incidents of the relation. But if the articles of some particular partnership contain an express stipulation, or if it can be shown that there was an understanding, tacit or otherwise, between the partners, to the contrary effect, in that partnership there is no right to contribution. In no case, either, has a partner such a right as to another partner whom he has, by his own fraud or misrepresentations, enticed into the firm membership; for the person so enticed is in a position to withdraw from the partnership agreement, and is not liable for losses of the firm that it brought into being.[63] Prima facie, however, all losses or expenditures for the firm are to be equally borne by all the partners.[64]

61 Burdon v. Barkus, 4 De Gex, F. & J. 42. 51. See Ex parte Williamson, 5 Ch. App. 309, 313. A payment by one partner of money in excess of his share of the capital, not derived from partnership profits, when it was necessary to be paid to preserve the partnership property and carry on the business, constitutes a preferred claim on the partnership property, which must be paid before there can be any surplus found to be divided among partners. Matthews v. Adams (Md.) 35 Atl. 60.

62 McKewan's Case, 6 Ch. Div. 447; Hole v. Hurrison, 1 Ch. Cas. 246; Wadeson v. Richardson, 1 Ves. & B. 103. And see Dering v. Earl of Winchelsea, 1 Cox, Ch. 318; Peter v. Rich, Rep. Ch. 19.

63 Rawlins v. Wickham, 1 Giff. 355; Newbigging v. Adam, 34 Ch. Div. 582; Pillans v. Harkness, Colles, 442.

64 See ante, p. 116.

Limit as to Amount of Contribution.

The total amount recoverable is not necessarily limited by the nominal capital of the partnership, for the expenditure on existing undertakings cannot be measured by the extent of the capital.[65] On the other hand, the limit of contribution may be fixed beforehand, by express agreement among the members of a firm; and in that case no partner can call upon the others to exceed it, however great may have been the amount of his own outlay on behalf of the firm.[66] This has nothing to do with the obligations of the partners to third persons, and accordingly does not affect the rule that "as to the rest of the world," unless the particular creditor has agreed to look only to some particular fund, "each partner is liable for the whole amount of the debts of the partnership." [67]

Advances not Considered Voluntary Payments.

An outlay made by one partner, in any such emergency as has been suggested above, does not ever fall within the law as to "voluntary payments," by which law any money paid by an individual for another's advantage, without being requested or compelled to do so, cannot be recovered back from the beneficiary; and the reason why this is so is that in the case of the outlay by the partner the benefit accrues to the partner making it, as well as to his co-partners who are called upon subsequently to contribute to make his outlay good to him proportionately.[68]

Right to Contribution When the Outlay Concerns an Illegal Act.

No right of contribution exists in favor of a partner who has been put to loss through a pronounced illegal act,—a tort, in contradistinction to a mere transcending of powers,—in which all the

[65] Ex parte Chippendale, 4 De Gex, M. & G. 42.

[66] In re Worcester Corn Exchange Co., 3 De Gex, M. & G. 180. A partnership agreement required the profits and losses to be shared equally by the four partners, "provided, however, that" one partner, who furnished all the cash capital, should "in no event be put to a loss more than $1,250, and the balance" should "be made up and paid to him in case of greater loss by the other parties." Held, that the loss of said partner in excess of $1,250 was a joint and several liability of the others. Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[67] See post, p. 249.

[68] See 1 Colly. Partn. §§ 320, 324; Edminston v. Wright, 1 Camp. 88; Stokes v. Lewis, 1 Term R. 20; Child v. Morley, 8 Term R. 610.

partners participated, himself included,[69] although, if such act was a breach of trust, and one partner made good the default out of his private means, the right would accrue to him.[70] Pollock tells[71] us that as between joint wrongdoers themselves, where, from the very nature of the act out of which the suit arose, the partner sued alone, and compelled to pay the whole damages, must be presumed to have known it was illegal at the time, no right to indemnity or contribution from the other accrues to him, but that when the matter is indifferent in itself, and the wrongful act is not clearly illegal, but may have been done in honest ignorance, or, in good faith, to determine a claim of right, there is no objection to contribution or indemnity being claimed.

Right to Contribution Where Partner has Alone Become Bound.

If a partner acts for the firm, within the scope of its business, and within his authority as a partner, but in such a way that liability for his act attaches to him alone, he is entitled to contribution from his co-partners for any loss thereby occasioned him;[72] and if he has, with the knowledge and consent of his co-partners, defended an action brought upon such an act of his, and has so incurred expense for costs and attorney's fees, he is entitled to be compensated in the same manner for the expense so incurred, as well as for any damage that may be adjudged against him in the action.[73]

Right to Contribution When Loss was Due to Partner's Own Default.

When the loss for which the partner would have contribution was the result of his own fraud, negligence, or want of skill, or when he incurred it while acting outside of all authority pertaining to him as a partner, his demand is without merit, and will not be sustained.[74]

69 Thomas v. Atherton, 10 Ch. Div. 185.

70 Ashhurst v. Mason, L. R. 20 Eq. 225.

71 Torts, 170, 171.

72 Gleadow v. Glass Co., 13 Jur. 1020; Sedgwick's Case, 2 Jur. (N. S.) 949.

73 Browne v. Gibbins, 5 Brown, Parl. Cas. 491; Croxton's Case, 5 De Gex & S. 432.

74 Boughner v. Black's Adm'r, 83 Ky. 521; Murphy v. Crafts, 13 La. Ann. 519; Bury v. Allen, 1 Colly. 589, 604; In re Webb, 2 Moore, 500; McIlreath v. Margetson, 4 Doug. 278; Robertson v. Southgate, 6 Hare, 540. Under a bill for an accounting and settlement between partners, under a contract by which plaintiff

Ratification of Unauthorized Act.

But when a partner has contracted outside of his authority, or outside of the scope of the business, or otherwise, so that the firm would be justified in leaving him to bear alone the responsibility of his act, and all the partners have nevertheless, with full knowledge of the facts, accepted the responsibility as a firm one, and the several accounts of the partners have been charged accordingly, an attempt to charge the one partner solely upon dissolution of the partnership comes too late.[75]

When is the Right to Contribution Enforceable?

At law the right to contribution is enforceable only when loss has actually been sustained by the person complaining,[76] but in equity the prospect of immediate loss to him puts him in a position to bring his suit.[77]

DUTY TO CONFORM TO AGREEMENT.

74. Partners must conform to the partnership agreement, and not act beyond the scope of the partnership business.

The duty of partners to conform their actions to the agreement between them, and to keep within the scope of the partnership business, is clear. Where a loss is caused by a breach of this duty, not only will the partner guilty of the breach not be entitled to contribution from his co-partners, but, on the contrary, he must indemnify them.[78] For example, where a firm suffered a loss by reason of one partner signing the firm name to accommodation

agreed to purchase certain lands, defendants are entitled to recover the amount paid by them to an agent employed to get the deeds to the lands, such employment having been made necessary by the negligence of plaintiff. Morris v. Wood (Tenn. Ch. App.) 35 S. W. 1013. See, also, Yorks v. Tozer, 59 Minn. 78, 60 N. W. 846; Smith v. Smith, 18 R. I. 722, 29 Atl. 584, and 30 Atl. 602.

[75] Cragg v. Ford, 1 Younge & C. Ch. 285; Aubert v. Maze, 2 Bos. & P. 371.

[76] See Maxwell v. Jameson, 2 Barn. & Ald. 51; Spark v. Heslop, 1 El. & El. 563.

[77] Lacey v. Hill, L. R. 18 Eq. 182; Hobbs v. Wayet, 36 Ch. Div. 256.

[78] Campbell v. Campbell, 7 Clark & F. 166; Robertson v. Southgate, 6 Hare, 540; Bury v. Allen, 1 Colly. 604.

paper, in breach of the partnership agreement, such partner was held liable individually to his co-partners for the amount of the loss.[79] So, also, a partner who neglects and refuses, without reasonable cause, to perform personal services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services, in the settlement of the partnership accounts.[80]

RIGHT TO INFORMATION AS TO CONDUCT OF BUSINESS.

75. A partner has the right to be acquainted with the manner in which the business of a partnership is being conducted.

Even though a partner may, as we have seen above, leave the active management of the business altogether to the other members of the firm, he does not thereby deprive himself of the right to be informed particularly of all the firm's operations, and to scrutinize all its acts, to satisfy himself that good faith is being observed within the firm. A corresponding duty rests upon members of a partnership to so manage that there shall be no concealment, one from another, as to what is being done of common concern.[81] And this rule applies also to persons who, not yet being partners, are negotiating to become such.[82] Each one of the partners is under an obligation to attend to the firm's business, so far as it is given to him to attend to it, zealously and diligently, and with due regard to the good of his co-partners.[83] Lord Eldon said,[84] "There is an implied obligation among partners to use the property for the benefit of those whose property it is." In one case it was held that the failure of a partner to notify his co-partners of the service of process upon him, as the representative of the firm, in a suit against the firm, in which subsequently judgment was

79 Murphy v. Crafts, 13 La. Ann. 519.

80 Marsh's Appeal, 69 Pa. St. 30.

81 1 Colly. Partn. § 163, citing Goodman v. Whitcomb, 1 Jac. & W. 593, per Lord Eldon.

82 Fawcett v. Whitehouse, 1 Russ. & M. 132; Lindl. Partn. 313.

83 1 Colly. Partn. § 132.

84 In Crawshay v. Collins, 15 Ves. 227.

taken for plaintiff, and execution issued against firm property, rendered him liable to his co-partners.[85]

DUTY TO KEEP, AND RIGHT TO INSPECT, ACCOUNTS.

76. It is a partner's duty to keep correct accounts of his transactions, and allow them to be examined by his co-partners.

It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts.[86] So important is it to every partnership that proper accounts shall be kept and be accessible to all the partners, that, whenever any written articles of the partnership are entered into, clauses are inserted for the purpose of removing whatever doubts there might otherwise be upon the subject. It is the duty of every partner to keep precise accounts, and to have them always ready for inspection.[87] This duty is usually devolved upon some particular partner, or a clerk, in which case it is each partner's duty to give the bookkeeper all necessary information.[88] One partner has no right to keep the partnership books in his own exclusive custody, or to remove them from the place of business of the partnership.[89] In the absence of an express agreement to the contrary, every partner has a right, without the permission of his co-partners, to inspect, examine, and make extracts from, all the books of the firm;[90]

85 Devall v. Burbride, 6 Watts & S. (Pa.) 529.

86 Godfrey v. White, 43 Mich. 171, 188, 5 N. W. 243; Chandler v. Sherman, 16 Fla. 99; Rowe v. Wood, 2 Jac. & W. 558, per Lord Eldon; Goodman v. Whitcomb, 1 Jac. & W. 593. Cf. Vermillion v. Bailey, 27 Ill. 320.

87 Rowe v. Wood, 2 Jac. & W. 558; Goodman v. Whitcomb, 1 Jac. & W. 593.

88 Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73; Webb v. Fordyce, 55 Iowa, 11, 7 N. W. 385; Pomeroy v. Benton, 77 Mo. 64; Hall v. Clagett, 48 Md. 223; Pierce v. Scott, 37 Ark. 308; Kelley v. Greenleaf, 3 Story, 105, Fed. Cas. No. 7,657.

89 Taylor v. Davis, 3 Beav. 388, note; Greatrex v. Greatrex, 1 De Gex & S 692; Charlton v. Poulter, 19 Ves. 148, note.

90 Taylor v. Rundell, 1 Younge & C. Ch. 128; Id. 1 Phil. Ch. 222; Stuart v. Lord Bute, 12 Sim. 460.

and no partner can deprive his co-partners of this right by keeping the partnership accounts in a private book of his own, containing other matters with which they have no concern.[91] At the same time, if a person entitled to a share of the profits of a business expressly agrees that he will accept the balance sheets prepared by others as correct, and will not investigate the books or accounts himself, he will be bound by that agreement.[92]

Effect of Keeping No Books, or of Destroying Them.

If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due.[93] If all the persons interested in the account are in pari delicto, this rule cannot be applied; but it is the duty of continuing or surviving partners so to keep the accounts of the firm as at any time to show the position of the firm when a change among its members occurred.[94]

RIGHT TO HAVE PARTNERSHIP PROPERTY APPLIED TO PARTNERSHIP DEBTS—PARTNER'S LIEN.

77. A partner has a right to have the property of the partnership applied to the payment of the partnership debts.

78. A partner has a right to have whatever may be due the firm from his co-partners deducted from what would otherwise be payable to them in respect of their shares.

79. These rights are what is known as a "partner's lien."

91 Freeman v. Fairlie, 3 Mer. 43; Toulmin v. Copland, 3 Younge & C. 655. But see Ward v. Apprice, 6 Mod. 264.

92 Turney v. Bayley, 4 De Gex, J. & S. 332.

93 Pierce v. Scott, 37 Ark. 308; Walmsley v. Walmsley, 3 Jones & L. 556; Gray v. Haig, 20 Beav. 219.

94 Ex parte Toulmin, 1 Mer. 598, note; Toulmin v. Copland, 3 Younge & C. 655; Boddam v. Ryley, 1 Brown, Ch. 239; Id., 2 Brown, Ch. 2, 4 Brown, Parl. Cas. 561.

In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm.[95] And, in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership.[96]

Foundation of Partner's Lien.

In other words, each partner may be said to have an equitable lien on the partnership property, for the purpose of having it applied in discharge of the debts of the firm, and to have a similar lien on the surplus assets, for the purpose of having them applied in payment of what may be due to the partners, respectively, after deducting what may be due from them, as partners, to the firm.[97]

Consequences of the Lien.

This right, lien, quasi lien, or whatever else it may be called, does not exist, for any practical purpose, until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. Nor has any partner a right to insist, as against a judgment creditor of the firm, that he shall have recourse to the assets of the firm before seeking to obtain payment from the partners individually.[98] But when partnership accounts have to be taken, and the shares of the partners have to be ascertained, the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance.[99]

[95] See post, p. 413.

[96] See post, p. 415.

[97] Hoyt v. Sprague, 103 U. S. 613; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964; Dyer v. Clark, 5 Metc. (Mass.) 562; Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; West v. Skip, 1 Ves. Sr. 239; Skipp v. Harwood, 2 Swanst. Ch. 586; Doddington v. Hallet, 1 Ves. Sr. 498; Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 Ves. 3; Holderness v. Shackels, 8 Barn. & C. 612.

[98] See post, p. 249.

[99] 1 Lindl. Partn. 352. And see post, p. 413.

To What Property It Attaches.

While the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not, therefore, lost by the substitution of new stock in trade for old.[100] Further, on the death or bankruptcy of a partner his lien continues, in favor of his representatives or trustees, and does not terminate until his share has been ascertained, and provided for by the other partners.[101] But, after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock in trade assigned to him as a security for his loan.[102]

Lien Exists Only on Partnership Assets.

It follows from the principle on which the lien of a partner is founded that it only extends to the property of the firm, and to the separate interest of each partner in such property.[103] In those cases, therefore, where there is a partnership in profits only, but that which produces those profits belongs exclusively to one of the partners, the lien of the others is confined to the profits, and does not extend to that which produces them. Moreover, if two persons engage in a joint adventure, each consigning goods for sale upon the terms that each is to have the produce of his own goods, neither of them will have a lien on the goods of the other, nor on the produce of such goods, although each may have raised the money to pay for his own goods by a bill drawn on himself by the other, and ultimately dishonored.[104]

100 West v. Skip, 1 Ves. Sr. 239; Skipp v. Harwood, 2 Swanst. Ch. 586; Stocken v. Dawson, 9 Beav. 239, 17 Law J. Ch. 282. The lien attaches to partnership realty the title to which is in the individual name of one partner. Hiscock v. Phelps, 49 N. Y. 97; Dyer v. Clark, 5 Metc. (Mass.) 562; Taylor v. Farmer (Ill. Sup.) 4 N. E. 370; Evans v. Hawley, 35 Iowa, 83; Arnold v. Wainwright, 6 Minn. 358 (Gil. 241).

101 Stocken v. Dawson, 9 Beav. 239, 17 Law J. Ch. 282.

102 Payne v. Hornby, 25 Beav. 280; Nerot v. Burnand, 4 Russ. 247, 2 Bligh (N. S.) 215; Ex parte Morley, 8 Ch. App. 1026.

103 Mann v. Higgins, 7 Gill (Md.) 265.

104 Ex parte Gemmell, 3 Mont., D. & D. 198.

Lien Exists as against All Persons Claiming a Share in the Assets.

The lien of each partner exists, not only as against the other partners, but also against all persons claiming through them, or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy.[105] To hold, however, that this lien could be enforced against persons purchasing partnership property, would be, in effect, to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. While, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other partners,[106] a person who, bona fide, purchases from one partner specific chattels belonging to the firm, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale.[107]

Partnership Property Appropriated to Private Uses.

One consequence of the existence of this lien is that a partner has no right to apply partnership property to his own private uses. Where he does so, as where he uses it in payment of, or as security for, his individual debts, the person with whom he deals cannot hold it, as against the other partners, or those claiming under them, unless he can show that he is a bona fide holder for value, and without notice. A purchaser, however, is not bound to see to the application of the purchase money.[108]

No Lien on a Partner's Share for Ordinary Debts Due from Him to Firm.

The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm by or to the members thereof, as such. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their

[105] Hoyt v. Sprague, 103 U. S. 613; Moore v. Huntington, 17 Wall. 417; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; West v. Skip, 1 Ves. Sr. 239.

[106] Cavander v. Bulteel, 9 Ch. App. 79.

[107] In re Langmead's Trusts, 20 Beav. 20, 7 De Gex, M. & G. 353.

[108] Brickett v. Downs, 163 Mass. 70, 39 N. E. 776; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899; Janney v. Springer, 78 Iowa, 617, 43 N. W. 461; Farwell v. Trust Co., 45 Minn. 495, 48 N. W. 326. In re Langmead's Trusts, 20 Beav. 20, 7 De Gex, M. & G. 353.

character of members.[109] It has therefore been held that where a partner borrowed money from the firm for some private purpose of his own, and then became bankrupt, his assignees were entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect of this loan, and that the solvent partners were driven to prove against his estate in order to obtain payment of the money lent.[110]

Loss of Lien.

Further, a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner. Therefore, if, on a dissolution, it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner,[111] and if the property is accordingly divided, but the debts remain unpaid, the lien which each partner had on the property before its division is gone; and consequently no partner has a right to have the specific things allotted to any other partner brought back into the common stock, and applied in liquidation of the partnership liabilities.[112] Upon the same principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts, without any reserve, and this is done, neither partner has any lien on the share of the

109 Mack v. Woodruff, 87 Ill. 570; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Warren v. Taylor, 60 Ala. 218. Cf. Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Hayes v. Hayes, 66 N. H. 134, 19 Atl. 571; Scheuer v. Berringer, 102 Ala. 216, 14 South. 640. The lien does not cover individual debts owed by one partner to another. Mack v. Woodruff, 87 Ill. 570; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Hill v. Beach, 12 N. J. Eq. 31; Evans v. Bryan, 95 N. C. 174; Lewis v. Harrison, 81 Ind. 278.

110 Ryall v. Rowles, 1 Ves. Sr. 348, 1 Atk. 165; Meliorucchi v. Assurance Co., 1 Eq. Cas. Abr. 8. And see Smith v. De Silva, Cowp. 469. When one partner retires, and the continuing partner assumes the debts, the retiring partner's lien may be preserved by contract. Marsh v. Bennett, 5 McLean, 117, Fed. Cas. No. 9,110; Topliff v. Vail, 1 Har. (Mich.) 340; Harmon v. Clark, 13 Gray (Mass.) 114; Wildes v. Chapman, 4 Edw. Ch. (N. Y.) 669; Savage v. Carter, 9 Dana (Ky.) 408.

111 Giddings v. Palmer, 107 Mass. 269; Hapgood v. Cornwell, 48 Ill. 64; Robertson v. Baker, 11 Fla. 192; Hart v. Clark, 54 Ala. 490; Andrews v. Mann, 31 Miss. 322.

112 Lingen v. Simpson, 1 Sim. & S. 600; In re Langmead's Trusts, 7 De Gex, M. & G. 353, per Lord Justice Turner.

other in those proceeds, although it would have been otherwise if they had remained part of the common property of the two.[113]

No Lien if Partnership is Illegal.

If a partnership is illegal, its members have no lien upon their common property, or upon each other's shares therein,[114] unless it be by virtue of some agreement not affected by the illegality.

Lien of Co-owners.

Mere co-owners have no such lien as is enjoyed by co-partners.[115] But a part owner of a ship has a right to have the gross freight applied, in the first place, in payment of the expenses incurred in earning it.[116]

DIVISION OF PROFITS.

80. The times at which profits are to be divided, and the quantum to be divided at any one time, may be determined by a majority of the partners, in the absence of any contract on the subject.

81. On final accounting, only the excess of receipts over expenditures is divisible as profits; but, for the purpose of a preliminary or periodic division, the excess of the ordinary current receipts over the ordinary current expenditures may be divided as profits, and extraordinary expenses may be defrayed temporarily out of the capital.

The realization and division of profits is the ultimate object of every partnership, and the right of every partner to a share of the profits made by the firm to which he belongs is too obvious to

113 Holroyd v. Griffiths, 3 Drew. 428. In Holderness v. Shackels, 8 Barn. & C. 612, the transfer to each partner was subject to the lien, which was not, therefore, lost.

114 Ewing v. Osbaldiston, 2 Mylne & C. 88.

115 In re Leslie, 23 Ch. Div. 552; Kay v. Johnston, 21 Beav. 536.

116 Green v. Briggs, 6 Hare, 395; Alexander v. Simms, 18 Beav. 80, 5 De Gex, M. & G. 57; Lindsay v. Gibbs, 22 Beav. 522, 3 De Gex & J. 690. See, as to the lien of the master on freight, Bristoe v. Whitmore, 9 H. L. Cas. 391; Smith v. Plummer, 1 Barn. & Ald. 582.

require comment. Where there is no right to share profits, there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question.[117]

Times, etc., of Division.

The times at which the profits are to be divided; the quantum to be divided at any one time; the sums, if any, which are to be placed to the debit of the firm, in favor of any particular partner, for salary, interest on capital, etc., before any profits are to be divided,—these and all similar matters are usually made the subject of express agreement; but where no such agreement has been made, and no tacit agreement relative to them can be inferred, the principles already laid down in this chapter must be applied.[118] With respect to the times of division, and quantum to be divided at any given time, it is conceived that the majority must govern the minority, where no agreement upon the subject has been come to;[119] for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz. either to give way to the majority, or, if in a position so to do, to dissolve the partnership.[120]

What is Divisible as Profits.

Profits are the excess of receipts over expenses;[121] and, in winding up a partnership, nothing is properly divisible as profits which

117 See ante, p. 34 et seq.

118 As to the mode of ascertaining profits where a person not a partner is entitled to a share of them, see Rishton v. Grissell, L. R. 5 Eq. 326, L. R. 10 Eq. 393; Geddes v. Wallace, 2 Bligh. 270.

119 Kennedy v. Kennedy, 3 Dana (Ky.) 239. Stevens v. Railroad Co., 9 Hare, 326; Corry v. Railway Co., 29 Beav. 263 (as to declaring dividends before paying debts); Browne v. Canal Co., 13 Beav. 32 (as to paying dividends before works are finished). See, also, Wood v. Beath, 23 Wis. 254; Carithers v. Jarrell, 20 Ga. 842.

120 See ante, p. 158.

121 Welsh v. Canfield, 60 Md. 469; Fuller v. Miller, 105 Mass. 103; Grant v. Bryant, 101 Mass. 567; Gill v. Geyer, 15 Ohio St. 399. As to the payment of income tax, see Last v. Assurance Corp., 10 App. Cas. 438; Lawless v. Sullivan, 6 App. Cas. 373. And, where business is carried on abroad, see Colquhoun v. Brooks, 19 Q. B. Div. 400; Erichsen v. Last, 8 Q. B. Div. 414; Cesena Sulphur Co. v. Nicholson, 1 Exch. Div. 428; Sulley v. Attorney General, 5 Hurl. & N. 711. In order to compute profits, it is error to estimate the amount of assets by add-

does not answer this description. But for the purposes of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and while all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the business, and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year. It is obvious that, unless some such principle as this were had recourse to, there could be no division of profits, even of the most flourishing business, while any of its debts were unpaid and any of its capital sunk.[122] What losses and expenses ought to be treated as ordinary, and therefore payable out of current receipts, and what ought to be treated as extraordinary, and payable legitimately out of capital or money borrowed, is a question on which opinions may often honestly differ; and one which, when open to honest diversity of opinion, a majority of members can lawfully determine.[123] But, if the current receipts exceed the current expenses, it is apprehended that the difference can be divided as profit, although the capital may be spent, and not be represented by salable assets.[124]

ing to the cost price of goods on hand a certain per cent., as representing the selling price, though it appears that the partners had theretofore, at successive periods, taken stock in that manner. Gimpel v. Wilson, 10 Misc. Rep. 153, 30 N. Y. Supp. 942. On an accounting as to a partnership conducted for the purchase and sale of horses, the value of horses that died during the continuance of the business should be deducted from the profits. Smith v. Smith, 18 R. I. 722, 30 Atl. 602. A firm agreed to furnish plaintiff money with which to buy hogs for its packing house, and that he should receive for his services one-half of a certain member's share of the profits of the firm. Nothing was said as to how the money should be obtained, and no representation was made as to the firm's capital. It had no money of its own, and all the money it furnished to plaintiff was borrowed. *Held* that, in determining plaintiff's compensation, the interest paid for such money must be considered as an expense of conducting the business, and not as a profit in which plaintiff was to share. Helmer v. Yetzer (Iowa) 61 N. W. 206.

[122] 1 Lindl. Partn. 394.

[123] Gregory v. Patchett, 33 Beav. 595.

[124] Meserve v. Andrews, 106 Mass. 419; Whitcomb v. Converse, 119 Mass. 38; Braun's Appeal, 105 Pa. St. 414; Fletcher v. Hawkins, 2 R. I. 330; Parnell v. Robinson, 58 Ga. 26. As to the construction of clauses relating to payment of dividends out of profits, see Davison v. Gillies, 16 Ch. Div. 347, note; Dent v. Tram-

Cases Where Dividends have been Held not Improper.

Under ordinary circumstances, and in the absence of any agreement to the contrary, moneys earned ought to be treated as profits of the year in which they are received, and not as profits of the year in which they are earned.[125]

Exclusion from Share of Profits.

As will be seen hereafter, in the absence of an express agreement to that effect, partners have no right to expel one of their number, nor to forfeit his share.[126] Neither can they exclude him from the enjoyment of his share of profits.[127] A partner so excluded can compel his co-partners to restore him to his rights, and account to him accordingly.[128]

way's Co., Id. 344. As to paying dividends out of capital, see Bloxam v. Railway Co., 3 Ch. App. 337; Flitcroft's Case, 21 Ch. Div. 519.

[125] MacLaren v. Stainton, 3 De Gex, F. & J. 214, per Turner, L. J. Cf. Browne v. Collins, L. R. 12 Eq. 586.

[126] Ambler v. Whipple, 20 Wall. 546; Patterson v. Silliman, 28 Pa. St. 304; Gorman v. Russell, 14 Cal. 531.

[127] Griffith v. Paget, 5 Ch. Div. 894; Adley v. Whitstable Co., 17 Ves. 315, 19 Ves. 304, and 1 Mer. 107.

[128] 1 Lindl. Partn. 395.

CHAPTER V.

ARTICLES OF PARTNERSHIP.

82. In General—Purpose and Effect.
83–87. Rules of Construction.
88. Usual Clauses in Articles.
(a) The General Nature of the Business.
(b) The Time When the Business shall Commence.
(c) The Duration of the Relation.
(d) The Name or Style of the Firm.
(e) The Capital, Advances, etc.
(f) Rights of the Partners in Firm Property.
(g) Profits to be Distributed.
(h) Duties Resting upon Partners.
(i) Keeping of Proper Books of Account.
(j) Restraint upon Partners as to Their Exercising Similar Business on Individual Account.
(k) Decision of Differences among Partners by a Majority.
(l) Annual Account.
(m) General Account upon Dissolution.
(n) Representatives of Deceased Partner Succeeding to His Share in Firm Business.
(o) Retirement of a Partner, and Assignment of His Share.
(p) Clause of Expulsion.
(q) Arbitration.
(r) Liquidated Damages.

IN GENERAL—PURPOSE AND EFFECT.

82. Partners may, by express contract, regulate their rights, powers, and duties inter se. When they do so by formal, written instrument, such instrument is called the "articles of partnership."

It has been seen that a partnership may be established without a formal agreement to that effect,[1] and the rights and liabilities of the partners inter se, which will be implied by law from the mere fact of partnership, formed the subject of the preceding chapter.[2]

[1] Ante, p. 20.

[2] See ante, p. 157.

Where a partnership is deliberately formed, however, it is usual to provide by express agreement what the rights, powers, and duties of each partner shall be. This the partners are, of course, competent to do,[3] and their agreement overrides the presumption of law on the same subject. This formal agreement constitutes what is called the "articles of partnership."

RULES OF CONSTRUCTION.

83. Partnership articles are not intended to define all the rights and duties of partners (p. 190).

84. Articles must be construed with reference to the objects of the partners (p. 191).

85. Articles must be construed, if possible, so as to defeat fraud and the taking of unfair advantage (p. 192).

86. Provisions in the articles may be waived or varied by tacit agreement evidenced by conduct (p. 193).

87. Original articles will apply to a partnership continued under them (p. 195).

In General.

The articles of partnership constitute the regulations that are to govern the partners, within the relation, as to each other. But it is not to be inferred from this that the letter of the articles must govern the partners in all cases; for the binding effect depends somewhat upon the conduct of the parties, which conduct, if sedulously maintained in defiance of the provisions of the articles, creates a rule contrary to the articles, in governing the relations of the parties.[4] Thus, Collyer tells us[5] that: "It will be necessary to bear in mind three important observations made at different times by Lord Eldon. They are these: (1) Partnerships are regulated either by express contract, or by the contract implied by law from the

[3] Hall v. Sannoner, 44 Ark. 34.

[4] McCall v. Moss, 112 Ill. 493; Gammon v. Huse, 100 Ill. 234; Dow v. Moore, 47 N. H. 419; Henry v. Jackson, 37 Vt. 431; England v. Curling, 8 Beav. 129; Pilling v. Pilling, 3 De Gex, J. & S. 162. But see Thomas v. Lines, 83 N. C. 191.

[5] Partn. (6th Ed.) § 154.

relation of the parties. The duties and obligations arising from that relation are regulated, as far as they are touched, by the express contract. If it does not reach all those duties and obligations, they are implied and enforced by the law.[6] (2) Partnership articles are read in a court of equity as not containing the clauses on which the parties have not acted.[7] (3) The transactions of partners are always to be looked at, in order that you may determine between them, even against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration." [8]

Articles not Intended to Define All Rights, Powers, and Duties.

In other words, the rights and corresponding duties of partners mutually are never supposed to be all explicitly set forth in the articles.[9] Thus, it was said by Lord Langdale in the case of Smith v. Jeyes:[10] "The transactions of persons with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often a matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought not to be held, bound by the particular provisions contained in their express agreement. When it is insisted that the conduct of one partner entitled the other to a dissolution, we must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract."

[6] Crawshay v. Collins, 15 Ves. 226; Geddes v. Wallace, 2 Bligh, 297; Jackson v. Sedgwick, 1 Swanst. 460; Const v. Harris, Turn. & R. 523.

[7] Boyd v. Mynatt, 4 Ala. 79; Jackson v. Sedgwick, 1 Swanst. 460; Simmons v. Leonard, 3 Hare, 581. But see Smith v. Chandos, 2 Atk. 159.

[8] Geddes v. Wallace, 2 Bligh, 297; Ex parte Barber, 5 Ch. App. 687.

[9] Nelson v. Bealby, 30 Beav. 472; Smith v. Jeyes, 4 Beav. 505; Browning v. Browning, 31 Beav. 316; Blisset v. Daniel, 10 Hare, 522.

[10] 4 Beav. 505.

Construction with Reference to Object of Partnership.

The objects of establishing the relation are to be considered, always, in the interpretation of the articles. In construing the articles, the first care should be taken to understand the objects for which the partnership was formed. For all the provisions are to be construed so as to advance these objects, rather than defeat them.[11] And, although the articles may not be so proposed as to make the provisions clear in all respects, the objects of the partnership will always be looked to as indicative of the intention of the parties in respect of these several provisions.

"When the purpose of the parties is distinctly recited or mentioned in the instrument, the words which seem of general extent are confined to the declared intentions of the parties."[12] In Gainsborough v. Stork[13] the articles provided that "if either of the parties should die during the 14 years intended for the partnership, and after an account passed between them, then the surviving partner should take to his own use all the goods, ready money, and things which, on the last casting up before such death, should happen to be in stock between them, and should pay, or satisfy, to the executor or administrator of the deceased partner, so much money as the share of such deceased partner amounted to at the time of such last account made." Subsequently to the making of the articles, the parties, by way of amending them, indorsed on them, in quotation from the articles, the provision set forth above, and added, in effect, that if, at the time of any such death, debts should be outstanding from New England or other foreign parts, which by reason of variation of exchange, or of such debts proving bad, it might damage the survivor to accept on the basis of the last account, it was agreed that upon the death of either party during the term the survivor should not be required to pay to the executor for any such foreign debts as at the time of the death were due to the joint trade, otherwise than as the survivor should get them in,

11 Chapple v. Cadell, Jac. 537; Const v. Harris, 1 Turn. & R. 525; Fennings v. Grenville, 1 Taunt. 241; Davies v. Hawkins, 3 Maule & S. 488; Glassington v. Thwaites, 1 Sim. & S. 131.

12 Colly. Partn. (6th Ed.) § 153.

13 Barnard, 312.

and then only for the deceased's share. But, upon the point being raised, Lord Hardwicke held, two accounts having been passed before a death occurred, that the indorsement extended only to such foreign debts as should be included in the last account stated before the death of a partner, and not to such debts accruing between the time of the account and the death, since the indorsement recited that part of the articles by virtue of which only such foreign debts were included as existed before the last stated account prior to the death of a partner.

Construction so as to Defeat Fraud, etc.

The articles will always be construed so as to frustrate any efforts of one partner to defraud or impose upon another.[14] To use Lindley's illustrations [15] of such injury to a partner, through another partner's fraud or imposition, that might occur but for this rule of interpretation: "Thus, it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his co-partners sign it upon the faith that it is correct, they will not be bound by it.[16] Again, it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share as appearing in the last account, with interest instead of subsequent profits; but if the partners do not, for several years, make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was carried to the credit of the deceased, with interest on such an amount." [17]

This rule governs also the defining of any powers, however explicitly given, with which one partner may be clothed by the articles. Such powers are necessarily given for the benefit of the firm as a whole, and not for the individual benefit of the person so

[14] Oldaker v. Lavender, 6 Sim. 239; Blisset v. Daniel, 10 Hare, 493; Wood v. Woad, L. R. 9 Exch. 190; Pettyt v. Janeson, 6 Madd. 146.

[15] 2 Partn. 408.

[16] Oldaker v. Lavender, 6 Sim. 239.

[17] Pettyt v. Janeson, 6 Madd. 146.

clothed; and therefore the latter's exercise of the powers, to the detriment of his co-partners, for his private ends, will not be tolerated.[18]

Provisions Waived or Varied by Tacit Agreement.

Any article, however express, is capable of being abandoned by the consent of all the partners; and this consent may be evidenced, not only by express words, but by conduct.[19]

"In ordinary partnerships, nothing is more clear than this: That although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if, in a common partnership, the parties agree that no one of them shall draw or accept bills of exchange in his own name without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect." [20]

This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that, in case of the death of a partner, his representatives should be paid an allowance, instead of profits; for it appeared that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature that it would have been

[18] So a power to expel must be construed for the benefit of the firm. Pol. Partn. art. 40.

[19] Gage v. Parmelee, 87 Ill. 329; Gammon v. Huse, 100 Ill. 234; Dow v. Moore, 47 N. H. 419; Thrall v. Seward, 37 Vt. 573; Hall v. Sannoner, 44 Ark. 34. Where it is uncertain, from the terms of a co-partnership agreement, whether personal taxes of one of the partners should be charged to the firm's expense account, the actual construction adopted by the partners through a number of years will be considered as giving a proper construction to the agreement. Snyder v. Seaman, 2 App. Div. 258, 37 N. Y. Supp. 696.

[20] Lord Eldon in Const v. Harris, Turn. & R. 523. And see Coventry v. Barclay, 33 Beav. 1, on appeal 3 De Gex, J. & S. 320; Pilling v. Pilling, 3 De Gex, J. & S. 162; England v. Curling, 8 Beav. 133; Somes v. Currie, 1 Kay & J. 605.

unfair to have applied the original agreement.[21] So, a practice of treating losses as bad, when discovered so to be, was held to apply, as between the executors of a deceased partner and the surviving partners, although the effect was to give the executors much more than they would otherwise have been entitled to.[22] So, where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held that, assuming him to be a partner in the proper sense of the term, and to have been originally bound by the articles to contribute to losses, the articles, so far as they obliged him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him.[23]

Same—Acts of the Majority in Respect of Changes.

There are some variations from the letter of the articles which a majority of the partners may effect, such being exceptions, for in most cases the changes must be acquiesced in by all; but, even in such exceptional cases, all the partners have the right to be heard pro and con, and, if any of them have not been given an opportunity to be so heard, the changes cannot bind the partners thus denied.[24]

Same—New Partners—How Affected by Changes.

A partner, having become such subsequently to the formation of the partnership, and having entered the firm through another partner, who has committed himself to some variation from the express terms of the articles, cannot insist upon the letter of the instrument governing those matters in respect of which the other has so committed himself.[25]

[21] Jackson v. Sedgwick, 1 Swanst. 460. And see Pettyt v. Janeson, 6 Madd. 146; Simmons v. Leonard, 3 Hare, 581.

[22] Ex parte Barber, 5 Ch. App. 687.

[23] Geddes v. Wallace, 2 Bligh, 270.

[24] Const v. Harris, Turn. & R. 496, 524. See Livingston v. Lynch, 4 Johns. Ch. 573; Manegold v. Grange, 70 Wis. 575, 36 N. W. 263; Abbot v. Johnson, 32 N. H. 9; England v. Curling, 8 Beav. 129; Const v. Harris, Turn. & R. 496.

[25] Wilson v. Lineberger, 83 N. C. 524, 528; Sangston v. Hack, 52 Md. 173; Const v. Harris, Turn. & R. 496, 521. See Boardman v. Close, 44 Iowa, 428.

Original Articles Apply to Partnership Continued under Them.

If a partnership originally entered into for a definite time is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners inter se.[26] Thus, in King v. Chuck[27] three partners, A., B., C., agreed that, if either of them should die, his capital, as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B. died, and it was held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

Same—Provisions Applicable during the Term of Partnership.

Even where a partnership is entered into for a term of years, and the articles provide for events happening during the term, or during the partnership, the above rule has been still applied. Thus, where two persons agreed to become partners for 14 years, and stipulated that, if either died during this co-partnership term, his share should be taken by the other at a certain sum, and the 14 years expired, and the two persons continued in partnership together without coming to any fresh agreement, and then one of them died, it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor, upon payment of the sum mentioned.[28] The expression "the partnership term" was held equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

But the authorities on this head are not uniform. In their pres-

[26] U. S. Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791; Robertson v. Miller, 1 Brock. 466, Fed. Cas. No. 11,926; Mifflin v. Smith, 17 Serg. & R. 165; Gould v. Horner, 12 Barb. (N. Y.) 601; Blasdell v Souther, 6 Gray (Mass.) 149; Frederick v. Cooper, 3 Iowa, 171; Sangston v. Hack, 52 Md. 173; Stephens v. Orman, 10 Fla. 9; Bradley v. Chamberlin, 16 Vt. 613.

[27] 17 Beav. 325.

[28] Essex v. Essex, 20 Beav. 442. And see Cox v. Willoughby, 13 Ch. Div. 863.

ent state, it is doubtful whether a clause giving a right of pre-emption is one of those which is operative after the termination of the partnership originally contemplated, unless the articles are clear upon the subject. A right of expulsion has been held not to apply to a partnership continued after the expiration of the time for which it was originally entered into.[29] But an arbitration clause has been held to apply.[30]

USUAL CLAUSES IN ARTICLES.

88. Articles of partnership usually contain express stipulations as to some or all of the following subjects:

(a) The general nature of the business (p. 197).
(b) The time when the business shall commence (p. 198).
(c) The duration of the relation (p. 199).
(d) The name or style of the firm (p. 199).
(e) The capital, advances, etc. (p. 200).
(f) Rights of the partners in firm property (p. 203).
(g) Profits to be distributed (p. 203).
(h) Duties resting upon partners (p. 203).
(i) Keeping of proper books of account (p. 204).
(j) Restraint upon partners as to their transacting similar business on individual account (p. 205).
(k) Decision of differences among partners by a majority (p. 205).
(l) Annual accounts (p. 205).
(m) General account upon dissolution (p. 206).
(n) Representatives of deceased partner succeeding to his share in firm business (p. 206).
(o) Retirement of a partner, and assignment of his share (p. 207).
(p) Clause of expulsion (p. 208).
(q) Arbitration (p. 209).
(r) Liquidated damages (p. 210).

[29] Clark v. Leach, 32 Beav. 14. See Neilson v. Iron Co., 11 App. Cas. 298.

[30] Gillett v. Thornton, L. R. 19 Eq. 599. For other provisions which have been held not to continue, see Wilson v. Simpson, 89 N. Y. 619; Duffield v.

Having now alluded to the more important general rules which require to be borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

In framing articles of partnership, it should always be remembered that they are intended for the guidance of persons who are not lawyers, and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to courts of justice.

General Nature of Business.

The nature of the business should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers; and upon it also, in a great measure, depends the power of a majority of partners to act in opposition to the wishes of the minority. The nature of the business into which the parties have embarked cannot be changed after they have agreed upon it in their articles, except by the unanimous consent of the partners.[31] In the case cited, Lord Eldon decided that a joint-stock company established to carry on a fire and life insurance business could not, except by the unanimous consent of its members, afterwards include marine insurance in its business.

Brainerd, 45 Conn. 424; Clark v. Leach, 32 Beav. 14; Featherstonhaugh v. Fenwick, 17 Ves. 298.

31 Natusch v. Irving, Gow, Partn. Append. 407; Colly. Partn. (Wood's Ed.) § 155. A partnership agreement, and renewals thereof, recited that the parties had associated themselves in the "regular real-estate * * * business," and provided for a division of the net profits arising from "said brokerage business." Held, the term "regular real-estate business" meant the business of real-estate brokers, and did not include speculation in real estate. Davis v. Darling, 80 Hun, 299, 30 N. Y. Supp. 321.

The Place of Business.

The place of business should also be stated in the articles, and if the place is held on lease, or is otherwise held upon a tenure that may expire before the term provided for the expiration of the firm relation, provision should be made for the renewal of the lease, or for the acquisition of another place of business; otherwise the business may come to a premature end, as was the case in Clements v. Norris,[32] where the business was to be carried on at a particular place, or at such other place as the partners might agree upon, and they disagreed.

Time of Commencement of Partnership.

The time at which the business is to commence should be set out in the articles. In default of being so set out, however, the business constructively begins at the date of the articles.[33] If the articles set forth a time other than such date, either prior or subsequent to the latter, the provision binds the partners, so that the profits and losses are to be accounted between them only as from the date mentioned, but it does not affect outside creditors either one way or the other. An agreement that a partnership shall date from a time past does not inure to the benefit of creditors, and an agreement that it shall date from a time future does not prejudice them, if in fact the parties act as partners before such time arrives.[34]

Same—Formal Contract to be Drawn Up.

It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If, in a case of this sort, the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations inter se so long as the more formal instrument is unexecuted.[35]

[32] 8 Ch. Div. 129.

[33] Guice v. Thornton, 76 Ala. 466; Williams v. Jones, 5 Barn. & C. 108.

[34] Vere v. Ashby, 10 Barn. & C. 288; Battley v. Lewis, 1 Man. & G. 155.

[35] England v. Curling, 8 Beav. 129, 133.

Duration of Partnership.

The period for which the relation is to endure should be stated in the articles, but, notwithstanding its being so stated, a dissolution of the firm may take place before the end of the term stated. Death or bankruptcy of a partner, marriage of a feme sole partner, the outbreak of war between countries of which the partners are respectively residents, each would work such a dissolution.[36] Besides this, any partner is at liberty, of course, to petition the court for a dissolution at any time, and, upon sufficient cause shown, dissolution will be decreed, without regard to the term stipulated for in the articles.[37] If, notwithstanding the articles and the time therein set forth for the expiration of the relation, the partners go on with the business without formulating new articles, the relation becomes a partnership at will; but the old articles, in default of new ones being agreed upon, control the relation thereafter existing, except in respect of the provision as to when the relation is to expire.[38] If the time for which the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the partnership may be dissolved at the will of any partner.[39]

The Name or Style of the Firm.

The agreement between partners upon the point as to what shall be the name or style under which the partnership business shall be transacted governs the parties, so that any one partner, by signing any instrument, to which the agreement might be held to refer, in any other way than in the firm style so agreed upon, does not necessarily bind the firm.[40] Collyer says:[41] "Where the members of a partnership contract by covenant that the firm shall be A., B., C. & D., it is a breach of that covenant for A. to sign those instruments to which the covenant refers in the name of A. & Co. So, also, strictly speaking, it is no less a breach of that covenant for D. to sign his own name, adding 'for Self and Partners.'" Lindley says:[42] "The name or style of the firm should be expressed, and

[36] See post, p. 393 et seq. [37] See post, p. 404. [38] See ante, p. 195.

[39] Neilson v. Iron Co., 11 App. Cas. 298; Featherstonhaugh v. Fenwick, 17 Ves. 307.

[40] See post, p. 237 et seq. [41] (Wood's Ed.) § 158. [42] Partn. 413.

it should be declared that no partner shall enter into an engagement on behalf of the firm except in its name. Such an agreement is capable of being enforced, and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not."

Capital, Advances, etc.

The contributions to the capital of a firm should be expressed in money only, and, if one or more partners propose to put in lands or something else, the value thereof in money should be estimated, and the contribution be expressed accordingly. Otherwise there will always be confusion in the accounting, besides which the contributing partner will be disposed to regard the property as his, and not the firm's.[43]

Same—Good Debts.

If the contribution is made in "good debts," and the debtor from thenceforward trades with the firm, payments made by him without its being specified upon what account they are to be applied will be construed as made upon the debts contributed, until these are all paid.[44] And, if the debts so contributed realize more than the figure at which they are estimated in making the contribution, the surplus becomes part of the contributor's capital, and not profits of the firm.[45]

Same—Conditions Precedent.

When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfillment by each of his obligations is a condition precedent to his right to call for fulfillment by the others of their obligations. The rules laid down in the well-known note to Pordage v. Cole [46] must be applied to all such cases. These rules are as follows:

"(1) If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money

[43] 2 Lindl. Partn. 415.

[44] Toulmin v. Copland, 2 Clark & F. 681.

[45] Cooke v. Benbow, 3 De Gex, J. & S. 1.

[46] 1 Saund. 320a.

or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act.

"(2) When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance.

"(3) Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant; and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

"(4) But, where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and the performance must be averred.

"(5) Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and, in consideration thereof, B. covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

In conformity with these rules, it was held in Stavers v. Curling [47] that the plaintiff who had covenanted to proceed on a whaling voyage, and to obey the instructions of the defendants, but who had not obeyed them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants. So, in Kemble v. Mills,[48] where two persons had agreed to become partners, and one of them was to bring in £2,000, and do certain things, and the other was to bring in £5,000, it was held that an action lay for nonpayment

[47] 3 Bing. N. C. 355.

[48] 9 Dowl. 446. But see Marsden v. Moore, 4 Hurl. & N. 500.

of the £5,000, although the plaintiff did not state that he had brought in his £2,000, or had done any other of the acts which he had agreed to do.

Same—Unpaid Contributions.

If a partner does not pay, upon the inception of the business, the full amount of his share of the capital, he becomes at once a debtor to the firm, to the extent of what remains unpaid thereon. In Akhurst v. Jackson [49] a trader agreed to take two persons into partnership, upon the consideration of their paying in installments a certain sum. Becoming bankrupt after one of the installments had been paid, his assignees, it was held, were entitled to receive all the subsequent installments.

Same—Interest on Capital, Advances, and Withdrawals.

If any interest is to be allowed on capital and advances, it should be by virtue of some express provision in the articles. It should be paid, too, before the profits are ascertained, and the interest on advances should be paid before that on capital.[50]

The articles usually provide for the withdrawal by the individual partners, at stated intervals, of money for their subsistence. Such clause should also provide for the payment by these partners of interest on the excess of actual withdrawals over the figures fixed as the amounts to be withdrawn.[51]

Same—Indemnity for Loss to Partner.

As an inducement to secure the participation of one or more persons in forming a partnership, it is frequently agreed that such persons be secured or indemnified for any loss accruing to them in respect to their contributions to the capital. Lindley tells us that "there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity." [52]

[49] 1 Swanst. 85.

[50] 2 Lindl. Partn. 418. And see ante, p. 168.

[51] Payne v. Freer, 91 N. Y. 43.

[52] 1 Lindl. Partn. 15, citing Clift v. Barrow, 108 N. Y. 187, 15 N. E. 327; Geddes v. Wallace, 2 Bligh, 270; Bond v. Pittard, 3 Mees. & W. 357.

Rights of Partners in Firm Property.

The articles should always specify what is and what is not partnership property under the agreement of the partners; for it frequently happens that the firm contemplates the use in some way of property belonging exclusively to one or more of the partners, who do not propose, by entering into the relation, to donate such property to all the partners. It should also be provided that, as between the real and personal representatives of any partner who might die during the term, the share of such partner in the partnership real estate is to go to the latter. If the firm is to make expenditures upon the property of a partner, the articles should stipulate for a lien in favor of the firm on such property for compensation.[53] It should be expressly stipulated, also, as to what, if any, benefit the firm is to receive from the emoluments of an office held by one partner.[54] So, likewise, provision should be made as to how the profits of a patent, secret, or device of one partner shall be divided among all the partners of a firm organized to push or work such patent, secret, or device, and what restraints the individual partner shall be subjected to in regard to it.[55]

Division of Profits.

The profits of the business are usually divided among the partners according to their respective shares, but, if there is no reference in the articles to the amount of shares of the respective partners, the rule is, that all the partners participate equally in the profits.[56]

Duties Resting upon Partners.

The duties of the several partners should be defined in the articles, although they arise, of course, from the connection of the partner to the firm, rather than from any stipulation between them. It is customary to provide for the mutual good faith of the partners,—that they will be true and just to each other in their dealings, etc.; but this provision, as Lindley says,[57] is of service mere-

[53] See Bank of England Case, 3 De Gex, F. & J. 645; Pawsey v. Armstrong, 18 Ch. Div. 698; Burdon v. Barkus, 3 Giff. 412.

[54] Ambler v. Bolton, L. R. 14 Eq. 427; Smith v. Mules, 9 Hare, 556; Collins v. Jackson, 31 Beav. 645.

[55] Morison v. Moat, 9 Hare, 241. [56] See ante, p. 138. [57] 2 Partn. 418.

ly as a reminder to the partner. It has no legal effect, although an effort was once made to give such an effect to it that an indebtedness of one partner to another might be rendered by force of it a specialty.[58] It should be stipulated what amount of attention to the affairs of the partnership each partner is expected to give, particularly where more of such attention is required of one than another.[59] In no case can absence or inattention on account of illness be regarded as a breach of the agreement on the part of a partner.[60] Partners are usually restricted by the articles, in regard to certain acts, unless done with the sanction of the entire firm, e. g. releasing firm debts; speculating with firm funds; becoming surety; drawing, accepting, or indorsing bills, except in the course of business, etc.[61]

Keeping Books of Account.

The keeping of proper books of account is usually provided for by the articles, and also the assurance that they shall be open to the scrutiny of any of the partners. And yet the right of a partner to scrutinize the books exists even where it is not so provided for, and the denial of such a right to a partner is something for which he would be entitled to complain in any event. It is usual to provide that they be kept at the place of business, lest some dispute should arise among the partners as to which one of them should have the custody of them, in which event the others might not have all desirable access to them.[62]

58 Powdrell v. Jones, 2 Smale & G. 305.

59 See McFerran v. Filbert, 102 Pa. St. 73.

60 See Robinson v. Davison, L. R. 6 Exch. 269; Boast v. Firth, L. R. 4 C. P. 1.

61 Ritter v. Galitzenstein, 13 Daly (N. Y.) 452; 2 Lindl. Partn. 419.

62 McCall v. Moss, 112 Ill. 493. A partner, who, under the articles of partnership, is entitled to the use of the books of the firm, cannot be restrained from making extracts or copies therefrom (e. g. of the names and addresses of customers), even if he intends to use such extracts or copies after the dissolution of the firm, and in competition with his co-partners in setting up a business similar to that which the partnership carries on; and the fact that the good will is the exclusive property of the other partners makes no difference. Trego v. Hunt [1895] 1 Ch. 462, 12 Reports, 178.

Agreement not to Carry on Other or Competing Business.

The articles usually provide that no one of the partners shall exercise on his own account the same trade as that of the firm.[63] But this restraint, it has been held, does not affect his right to canvass for future business.[64] If, after covenanting not to go into any business other than that of the partnership, one partner, with the consent of the others, does go into another business firm, the articles and the consent so given will not have the effect of making all the partners in the former firm partners in the latter firm also.[65] But it might be otherwise if the one partner entered into the other firm in defiance of the articles, and without the consent of his co-partners.[66] The restraint would not extend to the partners going into a business of a kind different from that of the firm, unless it was so specifically expressed in the articles.

Decision of Differences by Majority.

The question as to how far, and in what respects, the members of the firm are to be controlled, if at all, by a majority of the partners, is sometimes settled in advance by some provision in the articles; and, in cases where there are many members, such a provision is very necessary. If it is to proposed to give the majority very full powers, it should be expressed very clearly in the articles; otherwise the effect would probably fail, through the interpretation of some other provision in the articles.[67]

Annual Accounts.

The articles usually provide that there shall be an annual account of the property, effects, and credits, on the one hand, and of the debts, on the other. Where, such a provision being present in the articles, the settlement to be on the 25th of March, and another provision being also present, to the effect that upon the death of a partner his estate should share in no profits earned since the last prior yearly settlement, a partner died in February, 1813, there hav-

63 See Starr v. Case, 59 Iowa, 491, 13 N. W. 645; Dean v. Macdowell, 8 Ch. Div. 345.

64 Coates v. Coates, Madd. & Gel. 287.

65 Bosanquet v. Wray, 6 Taunt. 597.

66 Somerville v. MacKay, 16 Ves. 382.

67 Falkland v. Cheney, 5 Brown Parl. Cas. 476. As to the implied powers of a majority, see ante, p. 158.

ing been no account had since November 5, 1811, the court held that the estate should share in profits up to the 5th of November, 1812.[68] These accounts should make the condition of the firm appear (1) as to third persons, and (2) as to the component members of the firm, and the articles should require them to be so prepared.[69]

General Account upon Dissolution.

The articles usually provide, also, for a general account, which shall be made upon the dissolution of the partnership, and the winding up of its business and distribution of its property.

There are two methods of winding up the business upon dissolution:[70] (1) By a general conversion of the property and effects into money, and a division of this money between the partners; (2) by one partner taking the whole upon a valuation, and paying to the other partners their shares. The former is the method pursued by courts of equity, in the absence of a stipulation to the other effect, in settling the affairs of a partnership. The latter is usually stipulated for in the articles. But it has been said that a stipulation giving the partners of one who becomes bankrupt the right to take his share at a valuation, and pay for it in installments in the course of years, is void, because it would give a partner power to control by contract the disposition of his property in the event of his bankruptcy.[71]

Same—Good Will.

This provision of the articles should also go to the proper disposition of the good will of the business.

Representatives Succeeding to Deceased Partner's Share.

It is often provided by the articles that a share of a partner in the business shall not be taken out upon his death, nor shall the latter event have the effect of dissolving the partnership, but that his executors or his representatives shall, as such, assume his

[68] Pettyt v. Janeson, Madd. & Gel. 146.

[69] See 2 Lindl. Partn. 420. As to the conclusiveness of accounts, see London Financial Ass'n v. Kelk, 26 Ch. Div. 107, 151; Oldaker v. Lavender, 6 Sim. 239; Blisset v. Daniel, 10 Hare, 493; Ex parte Barber, 5 Ch. App. 687; Laing v. Campbell, 36 Beav. 3; Wade v. Jenkins, 2 Giff. 509.

[70] See post, p. 408.

[71] 1 Colly. Partn. (Wood's Ed.) § 173. Cf. Rigden v. Pierce, Madd. & Gel. 353.

place and share, and the business shall proceed as if no death had occurred.[72] This provision is upheld by courts of equity when it appears to have been made for the purpose of perpetuating the partnership.

Where the articles give a partner the power of appointment, by will, of the person to whom his share shall go, the courts will uphold that provision, too. In Penton v. Dunn,[73] where the testator, without any specific reference to this power, had merely given all his estate to one of his children, it was held that the testator's interest in the partnership passed by this bequest. Such provisions, however, are not held to make it obligatory upon the representatives of deceased partners to accept these shares, they still remaining in the business, but merely to leave it to the option of such representatives to so do if they see fit.[74] But these representatives must give notice, within a reasonable time, if they are not disposed to continue the partnership; otherwise they will be considered partners.[75] In all cases, however, they must be allowed a reasonable time within which to acquaint themselves with the business, so as to be in a position to come to a judicious determination as to the course to be pursued by them.

Retirement of Partner and Assignment of Share.

Unless the articles provide for the retirement of partners before the end of the term of the partnership, all the members of the firm must remain so until such end, except, of course, that any one of them may, for cause, petition a court of equity to decree a dissolution, and may, too, assign his share, which would dissolve the partnership, under the principle of delectus personarum.[76]

But the articles may provide for this premature retirement of a partner. When they do, they should set forth, also, upon what terms such a retirement shall be allowed. A partner may, if the articles so provide, sell his share, and the articles may or may not impose restrictions upon such sale. The mere giving him the right to sell the share, however, does not necessarily carry with it any

72 See post, p. 397, and Page v. Cox, 10 Hare, 163.

73 1 Russ. & M. 402.

74 Pigott v. Bagley, McClel. & Y. 569; Madgwick v. Wimble, 6 Beav. 495; Downs v. Collins, 6 Hare, 418; Page v. Cox, 10 Hare, 163.

75 Pigott v. Bagley, McClel. & Y. 569. 76 See post, p. 397.

right to the purchaser to take part in the firm business, nor does it necessarily impose upon him firm obligations.[77] However, the partner selling agreeably to the articles has but to give to the firm proper notice of what he has done, and he then ceases to be a member of the firm.[78] If it is required by the articles that a partner availing himself of such a provision must offer his share to the other partners before selling it to a stranger, any one of the continuing partners may validly purchase it for himself.[79] If the articles require that the offer must be made first to the partners collectively, then to such as are disposed to purchase, and then to the individual partners, an offer to all the others would be equivalent to the three offers in the order mentioned.[80]

Same — What is Proper Notice of Intention to Sell Share.

Notice given in any such manner as to meet the attention of all the partners would be sufficient. Thus, it was held to be sufficient when the partner desiring to sell wrote notice of his intention in a book to which all the partners had access, and which was consulted at all monthly firm meetings; and in a case where the articles required the notice to be given at a monthly meeting, and one month previous to the sale.[81]

Same — Covenant of Indemnity.

It is provided often, in connection with the clause looking to the retirement of a partner, that the latter shall, after such retirement, be indemnified against the losses of the firm. If, at his retirement, his share is assigned to the firm itself, prudence would dictate his requiring a covenant to that effect at the time, without reference to the articles.[82]

Provision for Expulsion.

A provision for the expulsion of a member finds a place in the articles, as a rule, but applies to but few cases,—those, to wit, when

[77] Lovegrove v. Nelson, 3 Mylne & K. 20; Jefferys v. Smith, 3 Russ. 158. And see 1 Lindl. Partn. 365.

[78] See Glassington v. Thwaites, Coop. t. Brough. 115.

[79] Cassels v. Stewart, 6 App. Cas. 64. Cf. M'Glensey v. Cox, 5 Pa. Law J. 203.

[80] Homfray v. Fothergill, L. R. 1 Eq. 567.

[81] Glassington v. Thwaites, Coop. t. Brough. 115.

[82] See Saltoun v. Houstoun, 1 Bing. 433.

the partner has done acts to the decided prejudice of the partnership agreement. Insolvency would be such an act (that is, an inability to pay his debts); it not being necessary to wait until he had made an assignment, or anything of that sort, in order to attach such a character to the act.[83] Such a provision is very strictly construed, however, and it must always appear that the power of expulsion is exercised bona fide.[84]

When, under the articles, the firm was at liberty to dissolve the partnership as to any particular partner who might do any specified act, the provision would not have the effect of restraining his doing the act, if he might be so inclined, but only to bring the dissolution on him, as a consequence, if his partners should choose to have it so.[85] The expulsion will never be allowed when the objectionable partner has not been permitted to explain himself.[86] The articles should provide, too, for the number of partners necessary to act together to expel the members, and only the co-operation of this number can then effect the expulsion.

Arbitration.

Another very usual and essential feature in the articles is a provision that the disputes and differences that may from time to time arise among the partners shall be submitted to, and settled by, arbitration.[87]

As to the powers of an arbitrator, if the matter submitted embrace all the differences between the partners he may direct that the partnership be dissolved; and, if the terms of dissolution are left to him, he may make any of the ordinary terms that may seem to him appropriate.[88]

83 Hubbard v. Guild, 1 Duer (N. Y.) 662; Blisset v. Daniel, 10 Hare, 493. And see Russell v. Russell, 14 Ch. Div. 471; Steuart v. Gladstone, 10 Ch. Div. 626.

84 See post, p. 401.

85 Mills v. Osborne, 7 Sim. 37.

86 Lindl. Partn. 427.

87 Page v. Vankirk, 6 Phila. (Pa.) 264; Meaher v. Cox, 37 Ala. 201; Agar v. Macklew, 2 Sim. & S. 418; Street v. Rigby, 6 Ves. 815, 818; Livingston v. Ralli, 5 El. & Bl. 132.

88 Hutchinson v. Whitfield, Hayes, 78; Green v. Waring, 1 W. Bl. 475; Simmonds v. Swaine, 1 Taunt. 549; Lingood v. Eade, 2 Atk. 505; Wilkinson v. Page, 1 Hare, 276; Wood v. Wilson, 2 Cromp. M. & R. 241.

Liquidated Damages.

The usual last clause in the articles of partnership provides for payment by an offending partner to the others of a sum of money, as liquidated damages, in case of any breach of the covenants contained in the articles.[89] Such a provision is important only where the breach of the covenant is itself not liable to be indicative of some certain loss to the firm; for if it is thus indicative, the innocent partner has his action against the offender for the amount of loss so caused him. But Collyer says:[90] "It seems, however, that this proposition must not be extended to the case when the damages to be recovered are, of necessity, payable out of, or, when recovered, payable into, the partnership fund, because in this case the party bringing the action is liable to contribute to the fund out of which he seeks payment."

[89] See Hale, Dam. c. 4.

[90] Partn. p. 245.

CHAPTER VI.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

89. Power of Partner to Bind Firm.
90. Express Authority.
91–93. Implied Authority.
94. Particular Powers.
95. Sealed Instruments.
96. Bills and Notes.
97. Borrowing.
98. Simple Contracts.
99. Buying and Selling.
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106–108. Joint and Several Liability.
109. Extent of Liability.
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112–114. Assumption of Debts.
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116. Future Acts.
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119. Rights in Firm and Separate Property.
120. Firm Creditors in Firm Property.
121. Partners in Firm Property.
122. Separate Creditors in Firm Property.
123. Separate Creditors in Separate Property.
124. Firm Creditors in Separate Property.
125. Partners in Separate Property.
126. Joint and Separate Creditors in Firm and Separate Property.

POWER OF PARTNER TO BIND FIRM.

89. The power of a partner to bind the firm may result from either

(a) Express authority (p. 212), **or**

(b) Implied authority (p. 213).

SAME—EXPRESS AUTHORITY.

90. By express agreement authority may be conferred upon one partner to bind the firm by any act which would be binding if done by all the partners. A subsequent ratification is equivalent to antecedent authority.

The power of a partner to bind his firm in transactions with third persons is to be determined by the general principles of the law of agency. Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is responsible for whatever is done by any of the partners while acting for the firm within the limits of the authority conferred by the nature of the business it carries on.[1] To quote from Pooley v. Driver:[2] "Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners. But when you get that idea clearly, you will see at once what sort of an agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm, of which they are members; and, as he binds the firm, and acts on the part of the firm, he is properly treated as agent of the firm."

Of course, by express agreement, any power may be conferred upon a partner that could be lawfully exercised by all the partners, and also, as between themselves, the powers of a partner may be limited to any extent; but, as will be seen, such limitations do not affect third persons who deal with such partner without

[1] Burgan v. Lyell, 2 Mich. 102; Edwards v. Tracy, 62 Pa. St. 374; Blodgett v. Weed, 119 Mass. 215; Sage v. Sherman, 2 N. Y. 417; Pahlman v. Taylor, 75 Ill. 629; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424; U. S. Bank v. Binney, 5 Mason, 187, Fed. Cas. No. 16,791.

[2] 5 Ch. Div. 458, 476.

notice of the limitation of his powers.[3] Ratification is equivalent to antecedent authority.[4]

SAME—IMPLIED AUTHORITY.

91. The implied authority of a partner to bind the firm may be either

(a) Actual, or

(b) Apparent.

92. Prima facie, a partner has implied authority to bind the firm by any act necessary for carrying on the business in the ordinary manner. Unless limited by agreement between the partners, this implied authority is actual; when it is so limited, such authority is only apparent.

93. A partner has power to bind the firm by any act within his express or implied authority, either actual or only apparent, provided the person with whom he deals acts bona fide, and without notice of the limitation of his authority.

The powers of a partner are largely implied. Partnership articles are usually not intended, and do not attempt, to define all the rights and duties of a partner. Much is left to be understood and implied. So far as they are not expressly declared, they are determined by general principles, which are always applicable when not clearly excluded.

Briefly expressed, all acts done by a partner on behalf of the firm within the scope of its business are acts of the firm, and by

[3] Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Stark v. Corey, 45 Ill. 431; Stimson v. Whitney, 130 Mass. 591; Tradesmen's Bank v. Astor, 11 Wend. (N. Y.) 87. And see post, p. 236.

[4] Miller v. Glass Works, 172 Pa. St. 70, 33 Atl. 350; Russell v. Annable, 109 Mass. 72; Casey v. Carver, 42 Ill. 225; Cotzhausen v. Judd, 43 Wis. 213; Corbett v. Cannon (Kan. Sup.) 45 Pac. 80; Pacific Mut. Life Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. 155.

the acts of the firm all the partners are bound.[5] The phrase "scope of its business" means whatever is usually done by persons engaged in a similar business at the same time and place.[6] It includes whatever is reasonably necessary to carry on the business in the ordinary manner.[7] In the absence of express limitation, even as between themselves, a partner has a right to bind the firm to this extent. Where there is an express agreement limiting a partner's powers, he has no right to exceed that limit; but, if he does, and the person with whom he deals has no notice of the limitation, the firm is nevertheless bound, if the act was within the scope of its

[5] Eastman v. Cooper, 15 Pick. (Mass.) 276; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Mercein v. Andrus, 10 Wend. (N. Y.) 461; Beardsley v. Tuttle, 11 Wis. 74; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332.

[6] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Lynch v. Hillstrom (Minn.) 67 N. W. 636.

[7] Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Garland v. Hickey, 75 Wis. 178, 43 N. W. 832; National Exch. Bank v. White, 30 Fed. 412; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Taylor v. Webster, 39 N. J. Law, 102. Chief Justice Marshall said in this connection: "This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of co-partnership are perhaps never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine those articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law." Winship v. Bank, 5 Pet. 529, 560. See, also, Le Roy v. Johnson, 2 Pet. 186; Kimbro v. Bullitt, 22 How. 256; Wheeler v. Sage, 1 Wall. 518.

business, because every partner has apparent authority to bind his firm to that extent.[8] "Whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people." [9] But, though the firm is bound in such a case to the third person, the partner so exceeding his authority is liable to his co-partners for any damage resulting from his breach of the agreement. Where the third person had notice of the limitation upon the partner's authority, the firm is, of course, not bound.[10] These rules are relaxed somewhat, according to any usage or habit the firm may have acquired, inconsistent with strict limitations in the partnership agreement, in respect to the line of the firm's business.[11]

Necessity the Limit of Authority.

It will be observed that what is necessary to carry on the partnership business in the ordinary way is made the test of authority where no actual authority or ratification can be proved. The act of one partner to bind the firm must be necessary for the carrying on of its business. If all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient, in the absence of evidence of sanction by the other partners.[12]

Same—Extraordinary Necessity.

Nor, it seems, will necessity itself be sufficient, if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test;[13] and therefore, in a case where the nature of the

[8] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Hotchin v. Kent, 8 Mich. 526; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Wagnon v. Clay, 1 A. K. Marsh. (Ky.) 257.

[9] Lindl. Partn. 124. See Morse v. Richmond, 97 Ill. 303.

[10] Bailey v. Clark, 6 Pick. (Mass.) 372; Boardman v. Gore, 15 Mass. 339; Ensign v. Wands, 1 Johns. Cas. 171; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872.

[11] Woodward v. Winship, 12 Pick. (Mass.) 430.

[12] Dickinson v. Valpy, 10 Barn. & C. 128; Ricketts v. Bennett, 4 C. B. 686.

[13] Russell v. Annable, 109 Mass. 72; Barnard v. Road Co., 6 Mich. 274; Cotz-

business was one in which there was no necessity to borrow money to carry it on, under ordinary circumstances and in the ordinary manner, the court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin.[14] This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although, in the case referred to, the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have been the same if he had been a partner. For, notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his co-partners for his acts can only be established on the ground of agency. As their agent he has no discretion, except within the limits set by them to his authority; and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility.

94. PARTICULAR POWERS—Whether a partner has implied authority to do any given act depends upon the nature of the business and the custom of persons engaged in it.

The question whether a given act can or cannot be said to be necessary to the transaction of a business, in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is, therefore, necessarily admissible, and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business in the ordinary way may be wholly unnecessary for carrying on another. Consequently, no answer of any value can be given to the abstract question, can one partner bind his firm by such and such an act, unless, having regard to what is usual in business, it can be predicated of the act

hausen v. Judd, 43 Wis. 213; Thomas v. Harding, 8 Me. 417; Brettel v. Williams, 4 Exch. 623.

[14] Hawtayne v. Bourne, 7 Mees. & W. 595; Ex parte Chippendale, 4 De Gex, M. & G. 19.

in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are, obviously, very few acts of which any such assertions can be truly made. The great majority of acts, and practically all which give rise to doubt, are those which are necessary in one business and not in another. Take, for example, negotiable instruments. It may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, whether one partner can bind the firm by accepting bills in its name, admits of no general answer. The nature of the business and the practice of those who carry it on,—usage or custom of the trade,—must be known before any answer can be given.[15] Nevertheless, it may be of value to notice certain usual or important powers.

Acts not Within a Partner's Implied Powers.

A partner may not enter an appearance, so as to bind his copartners in an action against the firm;[16] nor can he bind them by submission of a firm controversy to arbitration;[17] nor by a confession of judgment;[18] nor by an assignment for the benefit of creditors,[19] though such assignment will bind him individually;

15 Boardman v. Adams, 5 Iowa, 224; Hogarth v. Latham, 3 Q. B. Div. 643; Taunton v. Insurance Co., 2 Hem. & M. 135.

16 Hall v. Lanning, 91 U. S. 160; Adam v. Townend, 14 Q. B. Div. 103; Munster v. Cox, 10 App. Cas. 680.

17 Buchoz v. Grandjean, 1 Mich. 367; Buchanan v. Curry, 19 Johns. (N. Y.) 137; Harper v. Fox, 7 Watts & S. (Pa.) 143. But contra as to a parol submission. Hallack v. March, 25 Ill. 48; Gay v. Waltman, 89 Pa. St. 453.

18 Hall v. Lanning, 91 U. S. 160; Sloo v. Bank, 2 Ill. 428; Soper v. Fry, 37 Mich. 236; Squier v. Squier, 1 Lack. Leg. N. (Pa.) 193; Harper v. Fox, 7 Watts & S. (Pa.) 142; Crane v. French, 1 Wend. (N. Y.) 311; Remington v. Cummings, 5 Wis. 138. But see, as to a creditor's right to object, McCormick Harvesting Mach. Co. v. Coe, 53 Ill. App. 488.

19 Welles v. March, 30 N. Y. 344; Brooks v. Sullivan, 32 Wis. 444; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952; Crittenden v. Hill (Minn.) 63 N. W. 1030;

nor by his act purposing to extend the firm's business scope;[20] nor by a guaranty.[21] He cannot make a lease of realty for the firm,[22] although he can give a valid notice to quit.[23] He cannot mortgage the firm's real estate, although he can pledge the firm's chattels,[24] and that even for antecedent debts, and can redeem the pledge.[25] He cannot discharge his private debt by agreeing that it shall be set off against one due the firm.[26]

Acts Within a Partner's Implied Powers.

A partner binds his co-partners by an account rendered;[27] by the appointment of an agent or servant;[28] by varying a contract pre-

Stein v. La Dow, 13 Minn. 412 (Gil. 381); Bowen v. Clark, 1 Biss. 128, Fed. Cas. No. 1,721; Wooldridge v. Irving, 23 Fed. 676. But see Williams v. Frost, 27 Minn. 255, 6 N. W. 793, where an assignment by one partner during the absence of his co-partner from the country was held good. And cf. Voshmik v. Urquhart, 91 Wis. 513, 65 N. W. 60; Hennessy v. Bank, 6 Watts & S. (Pa.) 300. That a managing partner may make a valid assignment for creditors without the consent of a nonresident co-partner, see H. B. Claflin Co. v. Evans (Ohio Sup.) 45 N. E. 3.

[20] Lindl. Partn. 137.

[21] Duncan v. Lowndes, 3 Camp. 478.

[22] One partner has, according to the American cases, implied power to lease property to be occupied by the firm in the usual course of its business. Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Penn v. Kearny, 21 La. Ann. 21; Smith v. Cisson, 1 Colo. 29; Stillman v. Harvey, 47 Conn. 26. But see 1 Lindl. Partn. 139, citing Sharp v. Milligan, 22 Beav. 606.

[23] Doe v. Hulme, 2 Man. & R. 433; Doe v. Summersett, 1 Barn. & Adol. 135.

[24] Patch v. Wheatland, 8 Allen (Mass.) 102; Nelson v. Wheelock, 46 Ill. 24; Galway v. Fullerton, 17 N. J. Eq. 389.

[25] Harper v. Goodsell, L. R. 5 Q. B. 422.

[26] Lindl. Partn. 136. But see Grover v. Smith (Mass.) 42 N. E. 555. One partner cannot, as against the partnership, convey firm property in payment of an individual debt. Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Claflin v. Ambrose (Fla.) 19 South. 628.

[27] Burgan v. Lyell, 2 Mich. 102; Cady v. Kyle, 47 Mo. 346; Gulick v. Gulick, 14 N. J. Law, 578; Fergusson v. Fyffe, 8 Clark & F. 121. Where one firm succeeds another, a statement of indebtedness of each of the firms, rendered to third persons during the existence of the new firm, is as to each firm binding on one who, as a partner, is individually liable for the debts of both firms, when such statement is made by one acting as his managing agent in both firms during their existence. Waite v. High (Iowa) 65 N. W. 397.

[28] Durgin v. Somers, 117 Mass. 55; Mead v. Shepard, 54 Barb. (N. Y.) 474; Burgan v. Lyell, 2 Mich. 102; Harvey v. McAdams, 32 Mich. 472; Sweeney v.

viously made by them all;[29] by assenting to a deed of a debtor for the benefit of his creditors;[30] by assenting to a transfer of a debt;[31] by a penalty;[32] by a purchase;[33] by a release;[34] by his representations;[35] by accepting security for a debt;[36] by a ship charter.[37] A partner can accept payment for firm debts,[38] and receipt for same;[39] and this, too, although a dissolution may have taken place, and some third person have been appointed for the purpose.[40] Such an act would not, however, be effective, if the debt had, to the knowledge of the debtor, been assigned previously to an individual partner.[41] He can receive a bill in payment of a firm debt,[42] unless made in his own name, in which case, unless he had authority from the firm to accept it so made, or the bill is actually

Neely, 53 Mich. 421, 19 N. W. 127; Beckham v. Drake, 9 Mees. & W. 79; Burleigh v. White, 70 Me. 130; Barcroft v. Haworth, 29 Iowa, 462.

[29] Hillock v. Insurance Co., 54 Mich. 532, 20 N. W. 571; Leiden v. Lawrence, 2 New Reports, 283. But see Detroit v. Robinson, 42 Mich. 198, 3 N. W. 845; Horn v. Bank, 32 Kan. 518, 4 Pac. 1022.

[30] Dudgeon v. O'Connell, 12 Ir. Eq. 566; Morans v. Armstrong, Arms, M. & O. 25.

[31] Beale v. Caddick, 2 Hurl. & N. 326; Backhouse v. Charlton, 8 Ch. Div. 444.

[32] Beckham v. Drake, 9 Mees. & W. 79.

[33] Venable v. Levick, 2 Head (Tenn.) 351; Dickson v. Alexander, 7 Ired. (N. C.) 4; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497. But a partner has power to purchase only within the scope of the business. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160.

[34] Bruen v. Marquand, 17 Johns. (N. Y.) 58; Allen v. Cheever, 61 N. H. 32; U. S. v. Astley, 3 Wash. C. C. 508, 511, Fed. Cas. No. 14,472.

[35] Rapp v. Latham, 2 Barn. & Ald. 795; Wickham v. Wickham, 2 Kay & J. 478.

[36] Tomlin v. Lawrence, 3 Moore & P. 555.

[37] Thomas v. Clarke, 2 Starkie, 451; Ex parte Howden, 2 Montague, D. & D. 574.

[38] Anon., 12 Mod. 446; Salmon v. Davis, 4 Bin. (Pa.) 375; Vanderburgh v. Bassett, 4 Minn. 242 (Gil. 171). And to receive a tender of payment. Wyckoff v. Anthony, 9 Daly (N. Y.) 417; Douglas v. Patrick, 3 Term R. 683.

[39] Gordon v. Freeman, 11 Ill. 14; Steele v. Bank, 60 Ill. 23; Henderson v. Wild, 2 Camp. 561.

[40] Tyng v. Thayer, 8 Allen (Mass.) 391; Major v. Hawkes, 12 Ill. 298; Robbins v. Fuller, 24 N. Y. 570; Gillilan v. Insurance Co., 41 N. Y. 376.

[41] Hilton v. Vanderbilt, 82 N. Y. 591; Bank of Montreal v. Page, 98 Ill. 109.

[42] Heartt v. Walsh, 75 Ill. 200; Tomlin v. Lawrence, 3 Moore & P. 555. But see Columbia Nat. Bank v. Rice (Neb.) 67 N. W. 165. As to a partner's power to compromise, see Walker v. Lumber Co. (Ky.) 35 S. W. 272.

paid, the firm still has its right of immediate action against the debtor.[43] He can tender payment, and accept a tender, so as to bind the firm;[44] and so, also, the firm is bound by his refusal in either case, and by his refusal to pay a creditor upon demand, after tender once made and rejected.[45] He may have firm property insured,[46] and his receipt of notice by the insurers of abandonment of insurance binds the firm.[47] He can bind his firm generally by an admission,[48] and this, too, when he cannot testify so as to charge his co-partner; for instance, when it is sought to have him disclose what person or persons compose, with him, the partnership, in controversies when such a disclosure will avail the opposing parties to the action. The admission is effective only after it has been satisfactorily shown by other evidence that the parties charged are partners.[49] By statute, in some of the states, his admission cannot be received in respect of transactions and communications by him

[43] Hogarth v. Wherley, L. R. 10 C. P. 630.

[44] Wyckoff v. Anthony, 9 Daly (N. Y.) 417; Douglas v. Patrick, 3 Term R. 683.

[45] Peirse v. Bowles, 1 Starkie, 323.

[46] Graves v. Insurance Co., 2 Cranch, 439; Osgood v. Glover, 7 Daly (N. Y.) 367; Clement v. Association, 141 Mass. 298, 5 N. E. 847; Hillock v. Insurance Co., 54 Mich. 531, 20 N. E. 571; Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202.

[47] Hunt v. Royal Exchange Assurance, 5 Maule & S. 47. In an action against co-partners, the admissions of one partner as to the scope of the partnership business, not made at the time the contract sued upon was executed, are not admissible against the other partner. Taft v. Church, 162 Mass. 527, 39 N. E. 283.

[48] Wood v. Braddick, 1 Taunt. 104; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Hurd v. Haggerty, 24 Ill. 171; Collett v. Smith, 143 Mass, 473, 10 N. E. 173; Smith v. Collins, 115 Mass. 388; McCoy v. Lightner, 2 Watts, 347; Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104; Wiley v. Griswold, 41 Iowa, 375; First Nat. Bank v. Carpenter, 34 Iowa, 433; Munson v. Wickwire, 21 Conn. 513. As to admissions waiving the statute of limitations after dissolution of the firm, see Sage v. Ensign, 2 Allen (Mass.) 245; Kallenbach v. Dickinson, 100 Ill. 427.

[49] Oppenheimer v. Clemmons, 18 Fed. 886; Hahn v. Insurance Co., 50 Ill. 456; Wolle v. Brown, 4 Whart. (Pa.) 365; Odiorne v. Maxcy, 15 Mass. 39; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Wiley v. Griswold, 41 Iowa, 375; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151; Fickett v. Swift, 41 Me. 65. In an action on a note made by one partner in the firm name, his confessions are not admissible to prove the note a partnership transaction. Tuttle v. Cooper, 5 Pick. (Mass.) 414.

personally had with a deceased partner, in an action where the representatives of such deceased partner are the opposing parties to him in the action, or where he is interested in the issue of an action by or against such parties. A partner may transfer firm property in payment of firm debts.[50]

Same—Powers of Partner in Trading Partnerships.

In trading partnerships, as we have seen, a partner has more extended powers, inasmuch as there he may borrow money for the firm, and bind the firm by making and giving firm paper, and accepting and indorsing other paper in the firm name.[51] This power of the partner does not cover the borrowing of money whereby to increase the capital of the firm, for the capital is essentially the aggregate of the contributions of all the partners.[52] Such a transaction assumes, then, the nature of that of an individual partner borrowing to provide, as it were, money for his own contribution; he only, of course, being bound.[53] His power to borrow money so as to bind the firm includes, of course, the case of his obtaining money from the firm's bank by an overdraft;[54] but it does not include the cases of his accepting a bill in blank,[55] nor his opening a bank account in his own name.[56] If a partner borrows money to an amount beyond all reason, considering the business of the firm, the loan is made at the lender's peril; for he should have looked into the firm's business somewhat, and considered the extent of it.

[50] Van Brunt v. Applegate, 44 N. Y. 544. Cf. Locke v. Lewis, 124 Mass. 1, in which it was held that a transfer of firm property in payment of a private debt would not be avoided against a transferee who took the property without knowledge that it was firm property.

[51] Cameron v. Blackman, 39 Mich. 108; Lamb v. Durant, 12 Mass. 56; McConeghy v. Kirk, 68 Pa. St. 200; Bulkley v. Dayton, 14 Johns. (N. Y.) 387; Graser v. Stellwagen, 25 N. Y. 316; Freeman v. Carpenter, 17 Wis. 126; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043.

[52] Fisher v. Tayler, 2 Hare, 218.

[53] Greenslade v. Dower, 7 Barn. & C. 635.

[54] See Blackburn Bldg. Soc. v. Cunliffe, 22 Ch. Div. 61, 9 App. Cas. 857; Waterlow v. Sharp, L. R. 8 Eq. 501.

[55] Hogarth v. Latham, 3 Q. B. Div. 643.

[56] Alliance Bank v. Kearsley, L. R. 6 C. P. 433.

95. SEALED INSTRUMENTS—A partner has no implied power to bind his copartners by the execution of sealed instruments, except releases. Authority to do so may be given by parol.

There is, notably, one sort of liability that the firm cannot be exposed to by the act of one of the partners under merely implied authority; that is, a contract required to be under seal.[57] All the partners must join in such a contract to make it binding on the firm.[58] A single partner may assign a mortgage in payment of a firm debt, or release a mortgage under seal, and so bind his partners;[59] but in such cases it has been held that, the seal being not essential to the validity of the transaction, the rule does not apply. The partner must have express authority from his co-partners, in order to bind them, in all cases where a sealed instrument is nec-

[57] After giving the reason usually assigned for this rule, namely, a power to execute sealed instruments "would enable him to convey the real estate of the firm, or create liens upon it," etc., Mr. Bates says (1 Bates, Partn. § 413, note): "The doctrine is often resorted to in such cases as the foundation of the court's opinion, in place of searching for the truer and worthier reason that the act is intrinsically beyond the scope of the partnership relation, whether sealed or unsealed. And, if the limitation on the power to do these acts is not based on a better reason, the curious result will follow that the abolition in fourteen of our states of all difference between sealed and unsealed instruments has unavoidably enlarged the implied powers of partners already quite large enough."

[58] Van Deusen v. Blum, 18 Pick. (Mass.) 229; Clement v. Brush, 3 Johns. Cas. (N. Y.) 181; People v. Judges of Court of Common Pleas of Dutchess Co., 5 Cow. (N. Y.) 34; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; McBride v. Hagan, 1 Wend. (N. Y.) 326; McDonald v. Eggleston, 26 Vt. 154; McKnight v. Wilkins, 1 Mo. 308; Gerard v. Basse, 1 Dall. 119; Gibson v. Warden, 14 Wall. 244; U. S. v. Astley, 3 Wash. C. C. 508, Fed. Cas. No. 14,472. For certain exceptions to this rule, which have been permitted in bankruptcy proceedings, see Halsey v. Fairbanks, 4 Mason, 206, Fed. Cas. No. 5,964; Dudgeon v. O'Connell, 12 Ir. Eq. 566; In re Sauls, 5 Fed. 715; In re Barrett, 2 Hughes, 444, Fed. Cas. No. 1,043; Ex parte Hodgkinson, 19 Ves. 291. The authority of one member of a partnership to execute a sealed instrument of lease in the name of the firm will be presumed where his partner was instrumental in procuring the lease. Bodey v. Cooper, 82 Md. 625, 34 Atl. 362.

[59] Bruen v. Marquand, 17 Johns. (N. Y.) 58; Smith v. Stone, 4 Gill & J. (Md.) 310; U. S. v. Astley, 3 Wash. C. C. 508, Fed. Cas. No. 14,472; Halsey v. Fairbanks, 4 Mason, 206, Fed. Cas. No. 5,964.

essary to be executed.[60] But its execution by him in the presence of his co-partners, they being cognizant of the transaction, and offering no objection, would make it binding upon them without any more express authority being given.[61] It was formerly the disposition of the courts to hold that, if any one of the partners was not so present, and thus assenting, it would require a formal instrument under his hand and seal to clothe the partner officiating in the transaction with the requisite authority to bind such absentee;[62] but the courts are less strict in their requirements generally now than of old in this respect.[63] Where one partner has executed a sealed instrument for the firm, the other partners may be bound by a subsequent ratification of his unauthorized act.[64] The liability does not depend on there being, on the part of the partners acted for by the co-partner executing the instrument, some authority given previously to the actual execution; for they, by any subsequent acts by way of ratification, will assume the liability.[65] One partner may acknowledge a deed of the firm.[66] The partner attempting to execute a specialty for the firm will be individually liable.[67] A general partnership

[60] Snyder v. May, 19 Pa. St. 235; Fichthorn v. Boyer, 5 Watts (Pa.) 159; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; Hart v. Withers, 1 Pen. & W. (Pa.) 285; Cummins v. Cassily, 5 B. Mon. (Ky.) 74; Turbeville v. Ryan, 1 Humph. (Tenn.) 113.

[61] Fichthorn v. Boyer, 5 Watts (Ga.) 159; Ball v. Dunsterville, 4 Term R. 313; Burn v. Burn, 3 Ves. 578.

[62] Bentzen v. Zierlein, 4 Mo. 417; Cummins v. Cassily, 5 B. Mon. (Ky.) 74; Harrison v. Jackson, 7 Term R. 207.

[63] Smith v. Kerr, 3 N. Y. 144; Gram v. Seton, 1 Hall (N. Y.) 262; Smertz v. Shreeve, 62 Pa. St. 457; Wilcox v. Dodge, 12 Ill. App. 517; Russell v. Annable, 109 Mass. 72; Cady v. Shepherd, 11 Pick. (Mass.) 400.

[64] Smith v. Kerr, 3 N. Y. 144; Wilcox v. Dodge, 12 Ill. App. 517; Swan v. Stedman, 4 Metc. (Mass.) 548.

[65] Sweetzer v. Mead, 5 Mich. 107; Gwinn v. Rooker, 24 Mo. 290; Price v. Alexander, 2 G. Greene (Iowa) 427; Pike v. Bacon, 21 Me. 280.

[66] Lowenstein v. Flaurand, 82 N. Y. 494; Baldwin v. Tynes, 19 Abb. Prac. (N. Y.) 32; Williams v. Frost, 27 Minn. 255, 6 N. W. 793; Keck v. Fisher, 58 Mo. 532. But see Sloan v. Machine Co., 70 Mo. 206.

[67] U. S. v. Astley, 3 Wash. C. C. 508, Fed. Cas. No. 14,472; Van Deusen v. Blum, 18 Pick. (Mass.) 229; Tom v. Goodrich, 2 Johns. (N. Y.) 213; Skinner v. Dayton, 19 Johns. (N. Y.) 513; Gates v. Graham, 12 Wend. (N. Y.) 53; North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181; Hoskinson v. Eliot, 62 Pa. St. 393; Anderson v. Levan, 1 Watts & S. 334; Willis v. Hill, 2 Dev. & B. (N. C.)

agreement, though under seal, does not authorize the partners to execute deeds for each other.[68]

Release.

An exception to the rule that a partner has no implied power to execute sealed instruments exists in the case of technical releases. This is owing to the common-law rule that a release by any one of the holders of a joint claim discharges the claim of all.[69] A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm.[70] However, if it can be shown that one partner has, in fraud of his co-partners, and in collusion with the defendant, executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defense to an action against him.[71]

96. BILLS AND NOTES—A member of a trading partnership has implied power to bind the firm on negotiable instruments. A member of a nontrading partnership has prima facie no such power.

Every member of an ordinary trading partnership has implied power to bind the firm by drawing, accepting, or indorsing bills of exchange, or by making and indorsing promissory notes in its name and for the purposes of the firm.[72] And if two partners, unknown

231. But see Hart v. Withers, 1 Pen. & W. (Pa.) 285; Brown v. Bostian, 6 Jones (N. C.) 1.

[68] Harrison v. Jackson, 7 Term R. 207.

[69] Dwyer v. Sutherland, 75 Ill. 583; Wood v. Goss, 21 Ill. 604; Pierson v. Hooker, 3 Johns. (N. Y.) 68; Gillilan v. Insurance Co., 41 N. Y. 376; Wells v. Evans, 20 Wend. (N. Y.) 251; Smith v. Stone, 4 Gill & J. (Md.) 310; Noonan v. Orton, 31 Wis. 265; Furnival v. Weston, 7 Moore, 356; Ex parte Slater, 6 Ves. 146. But see Brayley v. Goff, 40 Iowa, 76; Gram v. Cadwell, 5 Cow. (N. Y.) 489.

[70] Emerson v. Baylies, 19 Pick. (Mass.) 55; Walmesley v. Cooper, 11 Adol. & E. 216. Cf. Richards v. Fisher, 2 Allen (Mass.) 527.

[71] Gram v. Cadwell, 5 Cow. (N. Y.) 489; Huntington v. Potter, 32 Barb. (N. Y.) 300; Brayley v. Goff, 40 Iowa, 76; Barker v. Richardson, 1 Younge & J. 362; Phillips v. Clagett, 11 Mees. & W. 84; Aspinall v. Railway Co., 11 Hare, 325.

[72] Winship v. Bank, 5 Pet. 529; Kimbro v. Bullitt, 22 How. 256; Dow v. Phillips, 24 Ill. 249; Johnson v. Barry, 95 Ill. 483; Silverman v. Chase, 90 Ill.

to each other, give two bills in the name of the firm in payment of the same demand, the firm will be liable on both bills, if held by bonâ fide holders for value without notice of the mistake.[73] A joint and several promissory note, signed by one partner for himself and co-partners, does not bind them severally;[74] but it does bind them and him jointly,[75] and himself separately.[76]

Nontrading Partnerships.

With respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his co-partners, by putting the name of the firm to a negotiable instrument, depends upon the nature of the business of the partnership.[77] In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers,[78] farmers,[79] attorneys,[80] physicians,[81] and partners operating a thresh-

37; Brayley v. Hedges, 52 Iowa, 623, 3 N. W. 652; Carrier v. Cameron, 31 Mich. 373; First Nat. Bank v. Freeman, 47 Mich. 408, 11 N. W. 219; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Fuller v. Percival, 126 Mass. 381; Blodgett v. Weed, 119 Mass. 215; Whitaker v. Brown, 16 Wend. (N. Y.) 505; Mechanics' Bank v. Foster, 44 Barb. (N. Y.) 87; Pinkney v. Hall, 1 Salk. 126; Swan v. Steele, 7 East, 210; Wintle v. Crowther, 1 Cromp. & J. 316. That a partner cannot bind the firm by a guaranty for the payment of a bill of exchange, see Duncan v. Lowndes, 3 Camp. 478.

[73] Davison v. Robertson, 3 Dow, 218.

[74] Sherman v. Christy, 17 Iowa, 322; Perring v. Hone, 2 Car. & P. 401.

[75] Doty v. Bates, 11 Johns. (N. Y.) 544; Lord Galway v. Matthew, 1 Camp. 403; Maclae v. Sutherland, 3 El. & Bl. 1.

[76] Snow v. Howard, 35 Barb. (N. Y.) 55; Fulton v. Williams, 11 Cush. (Mass.) 108; Gillow v. Lillie, 1 Bing. N. C. 695.

[77] Smith v. Sloan, 37 Wis. 285; Ulery v. Ginrich, 57 Ill. 531; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Deardof's Adm'r v. Thacher, 78 Mo. 128; Levi v. Latham, 15 Neb. 509, 19 N. W. 460; Pease v. Cole, 53 Conn. 53, 22 Atl. 681. The execution of a note for the purchase price of a team of horses is not within the implied powers of either partner of a firm engaged in the dairy business. Schellenbeck v. Studebaker, 13 Ind. App. 437, 41 N. E. 845. But in the following cases notes executed without express authority were held binding on the firm: Voorhees v. Jones, 29 N. J. Law, 270 (railroad contractors); Van Brunt v. Mather, 48 Iowa, 503 (a storage and forwarding firm); Miller v. Hines, 15 Ga. 197 (a law firm).

[78] Brown v. Byers, 16 Mees. & W. 252; Dickinson v. Valpy, 10 Barn. & C. 128.

[79] Kimbro v. Bullitt, 22 How. 256; Ulery v. Ginrich, 57 Ill. 531; Hunt v. Chapin, 6 Lans. (N. Y.) 139.

[80] Smith v. Sloan, 37 Wis. 285.

[81] Garland v. Jacomb, L. R. 8 Exch. 216; Levy v. Pyne, Car. & M. 453; Har-

ing machine.[82] If, however, a member of a nontrading firm concurs in drawing, or authorizes his partner to draw, a bill in the name of the firm, he impliedly authorizes its indorsement in the same name for the purpose for which it was drawn.[83]

A partner has no authority to sign a bank check postdated, and even an express authority to a partner to issue checks for the firm does not extend to postdated checks.[84] A bill drawn and accepted by one partner after the dissolution of a firm, although dated before, does not bind the firm.[85] But, when one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his co-partner, it was held to be an available security in the hands of an innocent indorsee.[86]

Bona Fide Holder.

A firm is bound on its paper to a purchaser for value without notice of the partner's abuse or lack of authority.[87] If one has written the firm name, having, to the knowledge of the person dealt with, no authority to do so, the firm is not required to pay the obligation in the hands of that person.[88] Thus, where paper in

man v. Johnson, 2 El. & Bl. 61; Crosthwait v. Ross, 1 Humph. (Tenn.) 23; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 637.

[82] Horn v. City Bank, 32 Kan. 518, 4 Pac. 1022.

[83] Kitner v. Whitlock, 88 Ill. 513; Dundass v. Gallagher 4 Pa. St. 205; Garland v. Jacomb, L. R. 8 Exch. 216; Lewis v. Reilly, 1 Q. B. 349.

[84] Forster v. Mackreth, L. R. 2 Exch. 163.

[85] Wright v. Pulham, 2 Chit. 121; Marlett v. Jackman, 3 Allen (Mass.) 287. One partner, after a dissolution of the partnership, cannot indorse notes or bills given before to the firm, so as to bind his co-partner, though he is authorized to settle up the firm business. Sanford v. Mickles, 4 Johns. (N. Y.) 224.

[86] Lacy v. Woolcott, 2 Dowl. & R. 458.

[87] Fuller v. Percival, 126 Mass. 381; Atlas Nat. Bank v. Savery, 127 Mass. 75; Munroe v. Cooper, 5 Pick. (Mass.) 412; Atlantic State Bank v. Savery, 82 N. Y. 291; First Nat. Bank v. Morgan, 73 N. Y. 593; Stall v. Bank, 18 Wend. (N. Y.) 466; Gale v. Miller, 44 Barb. (N. Y.) 420; Moorehead v. Gilmore, 77 Pa. St. 118; Ihmsen v. Negley, 25 Pa. St. 297; Miller v. Bank, 48 Pa. St. 514; Murphy v. Camden, 18 Mo. 122. One who loans money to a member of a mercantile firm, and receives from him a note executed in the name of the firm, has a right to presume that the note is made in the course of the partnership business. (Sherwood v. Snow, 46 Iowa, 481, followed.) Platt v. Koehler, 91 Iowa, 592, 60 N. W. 178.

[88] Powell v. Waters, 8 Cow. (N. Y.) 688; Boyd v. Plumb, 7 Wend. (N. Y.)

the firm name is given to satisfy a separate debt of the partner executing it, the firm is not bound.[89] There is more than one way in which commercial paper binding on the firm, or apparently so, may be drawn; and, because the whole transaction is not always to be gathered from the form of the paper, it may be said, generally, that the escape of the firm from liability depends upon the notice the holder has. Thus, the indorser of a note made by a partner individually cannot recover its amount from the firm, even though it be found, subsequently, that the latter had the benefit of it; for such indorser had notice of the private transaction.[90] And, for the same reason, a note made by a member of two firms in the name of one of them, in favor of his co-partner in the other firm, for an individual debt, would bind only the individual.[91] The firm is not bound if the act of the agent in putting the firm name on the paper has, knowingly to the other party, been done in fraud of his co-partners.[92] It might happen that the act has been done literally in the firm name, where the firm is not bound necessarily, —where the firm name is that of an individual, for instance, and this individual has executed and delivered a note. It would not appear here as a certainty whether the note was that of the individual or the firm. The burden of proof would be on the holder, in a case of this sort, to show that the note was given on the partnership account, because the presumption would be that the maker had acted on his individual behalf in the transaction.[93] In Penn-

309; Foot v. Sabin, 19 Johns. (N. Y.) 154; Smyth v. Strader, 4 How. (U. S.) 404; In re Irving, 17 N. B. R. 22, Case No. 7,074; West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557; Moynahan v. Hanaford, 42 Mich. 329, 3 N. W. 944; Bowman v. Bank, 3 Grant, Cas. (Pa.) 33. But see, for facts held not to show knowledge of lack of authority, Wait v. Thayer, 118 Mass. 473; Atlas Nat. Bank v. Savery, 127 Mass. 75; Ex parte Bushell, 3 Montague, D. & D. 615.

[89] Funk v. Babbitt, 55 Ill. App. 124; Leverson v. Lane, 13 C. B. (N. S.) 278. And see Hall v. West, 1 Lindl. Partn. (5th Eng. Ed.) 183. A partner cannot issue firm paper for his own accommodation. National Security Bank v. McDonald, 127 Mass. 82; Wilson v. Williams, 14 Wend. (N. Y.) 146; Chenowith v. Chamberlin, 6 B. Mon. (Ky.) 60; Heffron v. Hanaford, 40 Mich. 305.

[90] Peterson v. Roach, 32 Ohio St. 374.

[91] McConnell v. Wilkins, 13 Ont. App. (Can.) 438.

[92] New York Firemen's Ins. Co. v. Bennett, 5 Conn. 574; Cotton v. Evans, 1 Dev. & B. Eq. (N. C.) 284.

[93] Yorkshire Banking Co. v. Beatson, 5 C. P. Div. 109; U. S. Bank v. Bin-

sylvania, however, the burden of proof in such a case would be on the firm, the presumption being that the firm, rather than the individual, was the party intended as obligor.[94] As intimated above, the authorities are by no means unanimous on the question whether the firm can be held upon paper signed in blank in its name by a partner.[95]

97. BORROWING—A member of a trading partnership has implied power to borrow money and to pledge the firm's personal property as security. A member of a nontrading partnership has no such power.

The sudden exigencies of commerce render it absolutely necessary that power to borrow money should exist in the members of a trading partnership, and accordingly this power is clearly recognized.[96] It has been already seen that one partner can bind the firm by a bill or note, upon which money may be obtained, by the everyday process of discounting; and the power of one partner to pledge partnership goods for advances is equally well established.[97] At the same time, the power of borrowing money, like every other

ney, 5 Mason, 176, Fed. Cas. No. 16,791; Manufacturers' Bank v. Mathews, 16 Barb. (N. Y.) 608; Funk v. Babbitt, 55 Ill. App. 124. But it is otherwise where the firm name imports a partnership. Carrier v. Cameron, 31 Mich. 373; Vallett v. Parker, 6 Wend. (N. Y.) 615; Whitaker v. Brown, 16 Wend. (N. Y.) 505; Hogg v. Orgill, 34 Pa. St. 344. As to the liability of dormant partners, see Bank of Alexandria v. Mandeville, 1 Cranch, C. C. 575, Fed. Cas. No. 851; U. S. Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791; Ontario Bank v. Hennessey, 48 N. Y. 545; Miller v. Manice, 6 Hill (N. Y.) 114. Where a note is given partly for a private debt, and partly for a firm debt, the cases are not agreed as to the effect. King v. Faber, 22 Pa. St. 21; Rice v. Doane, 164 Mass. 136, 41 N. E. 126; Guild v. Belcher, 119 Mass. 257; Wilson v. Forder, 20 Ohio St. 89.

[94] Mifflin v. Smith, 17 Serg. & R. (Pa.) 165. But see Burrough's Appeal, 26 Pa. St. 264.

[95] That it can, see Chemung Canal Bank v. Bradner, 44 N. Y. 680. Contra, Hogarth v. Latham, 3 Q. B. Div. 643.

[96] Smith v. Collins, 115 Mass. 388; Pahlman v. Taylor, 75 Ill. 629; Blinn v. Evans, 24 Ill. 317; Church v. Sparrow, 5 Wend. (N. Y.) 223; Sherwood v. Snow, 46 Iowa, 481; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Winship v. Bank, 5 Pet. (U. S.) 529. See, also, Wilkins v. Pearce, 5 Denio (N. Y.) 541; Rothwell v. Humphreys, 1 Esp. 406.

[97] See ante, p. 224.

implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way. And consequently, if money is borrowed by one partner for the declared purpose of increasing the partnership capital,[98] or of raising the whole or part of the capital agreed to be subscribed in order to start the firm;[99] or if the business is such as is customarily carried on on ready-money principles, e. g. mining on the cost-book principle;[100] or without borrowing, as in the case of solicitors,[101]—the firm will not be bound, unless some actual authority or ratification can be proved. Still less will the firm be bound where borrowing is prohibited, and the person advancing the money is aware of the prohibition.[102]

Giving Security.

The power to borrow includes the power to give security. A partner may mortgage or pledge the personal property of the firm to secure loans made by him for antecedent debts,[103] or to secure fu-

98 Fisher v. Tayler, 2 Hare, 218.

99 Kirby v. McDonald, 17 C. C. A. 26, 70 Fed. 139; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820. A loan on the borrower's own credit, to enable him to contribute his share of capital in a partnership, does not constitute a partnership debt. Bannister v. Miller (N. J. Ch.) 32 Atl. 1066.

100 Burmester v. Norris, 6 Exch. 796; Hawtayne v. Bourne, 7 Mees. & W. 595; Ricketts v. Bennett, 4 C. B. 686.

101 Smith v. Sloan, 37 Wis. 285; Friend v. Duryee, 17 Fla. 111. So of a firm of physicians. Crosthwait v. Ross, 1 Humph. (Tenn.) 23.

102 In re Worcester Corn Exchange Co., 3 De Gex, M. & G. 180; Blackburn Bldg. Soc. v. Cunliffe, 22 Ch. Div. 61. When money is borrowed by a partner as an individual, the fact that it is applied for the benefit of the firm will not make the firm liable. Gibbs v. Bates, 43 N. Y. 192; National Bank v. Thomas, 47 N. Y. 15; Green v. Tanner, 8 Metc. (Mass.) 411; Donnally v. Ryan, 41 Pa. St. 306; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118. When money is borrowed for the firm, and the partner borrowing it uses it for private purposes, the firm is, nevertheless, liable. Stark v. Corey, 45 Ill. 431; Real Estate Inv. Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855; Freeman v. Carpenter, 17 Wis. 126; Warren v. French, 6 Allen (Mass.) 317; Hayward v. French, 12 Gray (Mass.) 453; Kleinhaus v. Generous, 25 Ohio St. 667.

103 Richardson v. Lester, 83 Ill. 55; Nelson v. Wheelock, 46 Ill. 25; Patch v. Wheatland, 8 Allen (Mass.) 102; Milton v. Mosher, 7 Metc. (Mass.) 244; Keegan v. Cox, 116 Mass. 289; Dickson v. Dryden (Iowa) 66 N. W. 148; Buettner v. Steinbrecher, 91 Iowa, 588, 60 N. W. 177; Bank of Gunterville v. Webb (Ala.)

ture advances;[104] but the power does not extend to mortgaging real property.[105]

98. SIMPLE CONTRACTS—A partner has implied power to bind the firm by contracts within the scope of the partnership business.

The line of trade or enterprise pursued by the firm is usually set forth in the articles of partnership; and, if parties dealing with a partner have actual notice of the scope of the business, through these articles or otherwise, and contract outside of such scope notwithstanding their having such notice, the firm is not bound.[106] In the absence of such actual notice on the part of the persons thus dealing with a partner, the firm is held; otherwise, in a case where such persons had information of facts which should have led a reason-

19 South. 14; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Woodruff v. King, 47 Wis. 261, 2 N. W. 452.

[104] Keegan v. Cox, 116 Mass. 289; McGregor v. Ellis, 2 Disn. (Ohio) 286; Rogers v. Gage, 59 Mo. App. 107. But a partner has no implied power to give security for the debts of others. Bank of Commerce v. Selden, 3 Minn. 160 (Gil. 99). It is within the power of one member of a partnership, acting in good faith, to make a chattel mortgage of all the partnership property, to secure partnership indebtedness. Settle v. Dry-Goods Co., 14 C. C. A. 144, 66 Fed. 850.

[105] Napier v. Catron, 2 Humph. (Tenn.) 534; Weeks v. Rake Co., 58 N. H. 101. But see McGahan v. Bank, 156 U. S. 218, 15 Sup. Ct. 347. In Re Clough, 31 Ch. Div. 324, a surviving partner was held to have power to deposit a contract for the sale of land as security for a pre-existing debt.

[106] Aultman & Taylor Co. v. Shelton, 90 Iowa, 288, 57 N. W. 857. One member of a firm of real-estate brokers may bind his co-partners by a revocation of a contract previously entered into by him with the owners of lands, whereby, for a time agreed on, such firm acquired an exclusive right to sell such lands. Harper v. McKinnis, 53 Ohio St. 434, 42 N. E. 251. One cannot claim profits under a lease made by a firm as a partner therein, and at the same time repudiate the lease because not joined in or assented to by him. Enterprise Oil & Gas. Co. v. National Transit Co., 172 Pa. St. 421, 33 Atl. 687. Where property of an old firm passing to a new firm, with new members, is subject to a mortgage executed by the old firm, an agreement authorizing the mortgagee, if he purchases on foreclosure, to apply the surplus proceeds to the payment of a debt of the old firm, not being within the scope of the partnership business of the new firm, must be agreed to by each member of the new firm individually. Kling v. Tunstall (Ala.) 19 South. 907.

ably prudent and cautious man to inquire.[107] At the same time, it should be remarked that these rules are relaxed somewhat, according to any usage or habit the firm may have acquired, inconsistent with strict limitations in the partnership agreement, in respect of the line of the firm's business.[108] In contracting with a partnership, persons in possession of no facts to guide them in determining the scope of the firm's business are at liberty to consider the usages of firms engaged in similar pursuits in the same locality.[109]

99. BUYING AND SELLING—A partner has implied power to buy and sell property within the scope of the firm's business.

It has long been decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way.[110] This cannot be more strongly exemplified than by the case of Bond v. Gibson.[111] There two persons carried on business as harness makers. One of them bought on the credit of the firm a number of bits to be made up into bridles; but, instead

107 Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Winship v. Bank, 5 Pet. 529; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820. A member of a firm engaged in the cattle commission business has authority to enter into an agreement whereby a bank is to furnish a customer money to purchase cattle with, in consideration that the firm accept drafts drawn on it to the extent of the net proceeds of the cattle shipped to it. First Nat. Bank v. Rowley (Iowa) 61 N. W. 195. An agreement by one member of a law firm with the purchaser of a note owned by the member individually that the firm would collect the note without charge, was not binding on the firm. Davis v. Dodson, 95 Ga. 718, 22 S. E. 645.

108 Woodward v. Winship, 12 Pick. (Mass.) 430.

109 Seaman v. Aschermann, 57 Wis. 547, 15 N. W. 788; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160.

110 Porter v. Curry, 50 Ill. 319; McDonald v. Fairbanks, 161 Ill. 124, 43 N. E. 783; Braches v. Anderson, 14 Mo. 441; Mead v. Shepard, 54 Barb. (N. Y.) 474; Dickson v. Alexander, 7 Ired. (N. C.) 4; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Cameron v. Blackman, 39 Mich. 108; Stecker v. Smith, 46 Mich. 14, 8 N. W. 583; Venable v. Levick, 2 Head (Tenn.) 351; Griffith v. Buffum, 22 Vt. 181; Smith v. Smyth, 42 Iowa, 493. A partner may buy land if necessary for the firm business. Davis v. Cook, 14 Nev. 265. But see Clay v. Carter, 16 Wkly. Notes Cas. (Pa.) 385; Judge v. Braswell, 13 Bush. (Ky.) 67.

111 1 Camp. 185.

of using the bits for the partnership business, he pawned them for his own use. The seller of the bits was, nevertheless, held entitled to recover their price in an action against both partners. The firm is liable, although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm.[112] But, as has been seen, the firm is not liable for goods ordered by and supplied to one partner, and which it was his duty to contribute to the joint stock of the firm.[113]

The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus, where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work, and became bankrupt, the printers were held liable for its price to the stationers who supplied it.[114] It is of no consequence what the partnership business may be, if the goods supplied are necessary for its transaction in the ordinary way.[115]

A purchase by a partner, although made with the intention to defraud his firm, will bind the latter, if the seller was not privy to the fraudulent intention.[116] If goods are bought by a partner actually and ostensibly as an individual, he alone is liable to the seller; and a partner, acting thus as an individual, and not as an agent, would in such a transaction still be solely liable, even should the firm become benefited by it.[117]

Selling.

Each member of a partnership has implied power to sell any part of the personal property of the firm, both corporeal and incorpo-

[112] Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Bracken v. March, 4 Mo. 74; Gardiner v. Childs, 8 Car. & P. 345.

[113] Ante, p. 229; Morlitzer v. Bernard, 10 Heisk. (Tenn.) 361; Greenslade v. Dower, 7 Barn. & C. 635.

[114] Gardiner v. Childs, 8 Car. & P. 345.

[115] A partner of a firm engaged in the livery business is acting within the scope of the partnership business when he procures horses for the use of the firm. Chapple v. Davis, 10 Ind. App. 404, 38 N. E. 355.

[116] Bond v. Gibson, 1 Camp. 185; Carver v. Dows, 40 Ill. 374; Clark v. Johnson, 90 Pa. St. 442; Kenney v. Altvater, 77 Pa. St. 34. And see Johnson v. Barry, 95 Ill. 483.

[117] Emly v. Lye, 15 East, 7; Hecker v. Fegely, 6 Watts & S. (Pa.) 139; Sinkler v. Lambert, 5 Phila. (Pa.) 36; Holmes v. Burton, 9 Vt. 252.

real.[119] He may transfer negotiable instruments belonging to the firm.[120] One partner selling firm property has implied power to bind the firm by a warranty of the property sold.[121] It is often stated that a partner may sell all the partnership property at one time, and thus terminate the partnership.[122] But the tendency of the modern cases is away from this rule. The better reason seems

119 Christ v. Firestone (Pa. Sup.) 11 Atl. 395; Peden v. Mail, 118 Ind. 560, 20 N. E. 446; Avery v. Fisher, 28 Hun (N. Y.) 508; Hudson v. McKenzie, 1 E. D. Smith (N. Y.) 358; Simonton v. Sibley, 122 U. S. 220, 7 Sup. Ct. 1351. A partner has power to sell after dissolution in order to wind up the business. Butchart v. Dresser, 4 De Gex, M. & G. 542. As to the right of a solvent partner to transfer firm property after the bankruptcy of his co-partner, see Fox v. Hanbury, Cowp. 445. A partner has power, after dissolution of the firm by death, to sell partnership realty to pay debts. Shanks v. Klein, 104 U. S. 18. That a partner has implied power before dissolution to sell the firm realty, see Thompson v. Bowman, 6 Wall. 316; Clark v. Allen, 34 Iowa, 190. And see Chester v. Dickerson, 54 N. Y. 1, holding that, though one partner cannot convey, he may make a binding contract of sale. Contra, Ruffner v. McConnel, 17 Ill. 212. A partner intrusted with the selling of the firm's products has the right to employ brokers to assist him in making sales. Mattingly v. Moore (Ky.) 30 S. W. 870. A fair sale made in good faith to an existing, bona fide creditor by one partner, without the consent of the other, may, where the purchaser has notice of such want of consent, be questioned by the non-assenting partner, but it is good as to all third persons. Klemm v. Bishop, 56 Ill. App. 613. One who knowingly receives partnership property with knowledge that its proceeds are passing to the individual use of one partner is charged with notice of such partner's want of authority to dispose of the property for his individual benefit. Columbia Nat. Bank v. Rice (Neb.) 67 N. W. 165. Where a partner sells firm goods under an agreement that one-fourth of the price should be applied on a private debt owed by the partner to the purchaser, the firm cannot recover such one-fourth. Grover v. Smith, 165 Mass. 132, 42 N. E. 555. A firm formed to buy and sell merchandise is bound by its contract assuming obligations of a debtor in consideration of a sale of merchandise by him to the firm, though the transaction was conducted by one partner. National Bank of the Republic v. Dickinson (Ala.) 18 South. 144.

120 George v. Tate, 102 U. S. 564; First Nat. Bank v. Freeman, 47 Mich. 408, 11 N. W. 219; Manning v. Hays, 6 Md. 5; Gerli v. Manufacturing Co. (N. J. Err. & App.) 31 Atl. 401.

121 Sweet v. Bradley, 24 Barb. (N. Y.) 549;

122 Lamb v. Durant, 12 Mass. 54; Tapley v. Butterfield, 1 Metc. (Mass.) 515; Arnold v. Brown, 24 Pick. (Mass.) 89; Deckard v. Case, 5 Watts (Pa.) 22; Graser v. Stellwagen, 25 N. Y. 315; Mabbett v. White, 12 N. Y. 442.

to require that the implied power of a partner to sell firm property be restricted to "property which is held for the purpose of sale." [123]

100. NOTICE—A partner has implied power to receive notice of matters touching the partnership business, and to bind the firm thereby.

As a general rule, notice to a principal is notice to all his agents, and notice to an agent of matters connected with his agency is notice to his principal.[124] Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members; [125] and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also, if it relates to the business of that other.[126] In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal.[127] When it is said that notice to one partner is notice to all, what is meant is (1) that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it

123 Wallace v. Yeager, 4 Phila. (Pa.) 251; Sloan v. Moore, 37 Pa. St. 217; Bender v. Hemstreet, 12 Misc. Rep. 620, 34 N. Y. Supp. 423; Kimball v. Insurance Co., 8 Bosw. (N. Y.) 495; Hunter v. Waynick, 67 Iowa, 555, 25 N. W. 776. A partner has not power, without his co-partner's consent, to sell all the partnership property, as such transaction is not within the scope and object of the partnership, or in the course of its business. Bender v. Hemstreet, 12 Misc. Rep. 620, 34 N. Y. Supp. 423.

124 Mechem, Ag. § 718.

125 Tucker v. Cole, 54 Wis. 539, 11 N. W. 703; Hubbard v. Galusha, 23 Wis. 398; Haywood v. Harmon, 17 Ill. 477; Holbrook v. Wight, 24 Wend. (N. Y.) 169; Miller v. Perrine, 1 Hun (N. Y.) 620; Hubbardston Lumber Co. v. Bates, 31 Mich. 158; Howland v. Davis, 40 Mich. 545; McClurkan v. Byers, 74 Pa. St. 405; Stockdale v. Keyes, 79 Pa. St. 251.

126 West Branch Bank v. Fulmer, 3 Pa. St. 399; Woodbury v. Sackrider, 2 Abb. Prac. 402.

127 Powell v. Waters, 8 Cow. (N. Y.) 669; Quinn v. Fuller, 7 Cush. (Mass.) 224; Sparrow v. Chisman, 9 Barn. & C. 241.

claims the benefit, or by whose acts it is bound; and (2) that, when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. The expression means no more than this; and, although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members. Where one member is acting beyond his powers, or is committing a fraud on his co-partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by him.[128]

LIABILITIES OF PARTNERS TO THIRD PERSONS.

101. Partners are liable to third persons for the acts of their co-partners when acting as agents of the firm. This liability is either

(a) In contract, or (p. 236)

(b) In tort (p. 242).

Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business it carries on. This liability of the partnership for the acts of its members rests on general principles of agency.[129]

[128] Williamson v. Barbour, 9 Ch. Div. 529, 535, per Jessel, M. R. Cf. Frank v. Blake, 58 Iowa, 750, 13 N. W. 50.

[129] Morse v. Richmond, 97 Ill. 303; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; Boardman v. Adams, 5 Iowa, 224.

SAME—IN CONTRACT.

102. Partners are liable on contracts made by a co-partner for the firm when the contract is

(a) Within his express authority.

(b) Within his implied powers.

The express and implied powers of one partner to bind the firm by contracts made for it have already been considered.[130] Whenever the partner has authority or power to contract for the firm, his co-partners are liable on contracts made by him.[131] If an act is done by one partner on behalf of the firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will prima facie be liable, although in point of fact the act was not authorized by the other partners. If an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will prima facie be not liable. In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; while in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners.[132]

103. RESTRICTIONS BY DISSENT—One partner may, by notice of his dissent, escape liability on contracts otherwise within the implied powers of a co-partner.

A partner may protect himself against the consequences of a future contract by giving notice of his dissent to the party with whom it is about to be made.[133] Where the firm consists of but two per-

[130] Ante, pp. 211–234.

[131] Hutchins v. Turner, 8 Humph. (Tenn.) 415.

[132] 1 Lindl. Partn. 125, citing Crellin v. Brook, 14 Mees. & W. 11; Dickinson v. Valpy, 10 Barn. & C. 128. And see Walden v. Sherburne, 15 Johns. (N. Y.) 422.

[133] Feigley v. Sponeberger, 5 Watts. & S. (Pa.) 564; Leavitt v. Peck, 3 Conn. 125; Johnston v. Dutton's Adm'r, 27 Ala. 245; Bradley Fertilizer Co. v. Cooke, 104 Ala. 402, 16 South. 138; Monroe v. Conner, 15 Me. 178; Gallway v. Mathew, 10 East, 264. Cf. Vice v. Fleming, 1 Younge & J. 227. The implied power of

sons, and there is nothing in the articles to prevent each having an equal voice in the direction and control of the common business, the duty of each partner requires him not to enter into any contract from which the other in good faith dissents. If he should do so, it would be a violation of the obligations which are imposed by the nature of the partnership. It would not, in fact, be the contract of the firm. If a firm is composed of more than two members, and one of them dissents to a contemplated contract, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the partnership articles or the nature of the partnership contract.[134] The powers of a majority in such cases to bind dissenting members have already been considered.[135] Where goods have been sold to a firm against the known wishes of a dissenting partner, the mere fact that the goods come to the use of the firm does not impose any liability on the dissenting partner to pay for them, for the purchase may have been made at a loss which he foresaw, and therefore sought to avoid.[136] Notice of dissent may be effectively given by a dormant partner, and to one who knew nothing of the existence of the partnership.[137] But one partner cannot, by notice to a debtor, prevent the latter paying the amount due to either partner.[138]

104. FORM OF CONTRACT—Partners are liable on contracts made by their co-partners only when the contract is in a form that binds the firm as principal, and not the partner personally.

The general proposition that a partnership is bound by those acts of a member which are within the scope of his authority must be

one partner to mortgage firm property is revoked by a dissent of his co-partners, as against a mortgagee who, at the time the mortgage was given, knew of the dissent. Carr v. Hertz (N. J. Ch.) 33 Atl. 194.

134 Johnston v. Dutton's Adm'r, 27 Ala. 245; Monroe v. Conner, 15 Me. 178; Nolan v. Lovelock, 1 Mont. 224.

135 Ante, p. 158.

136 Monroe v. Conner, 15 Me. 178. But see Johnson v. Bernheim, 86 N. C. 339.

137 Leavitt v. Peck, 3 Conn. 124.

138 Granger v. McGilvra, 24 Ill. 152; Noyes v. Railroad Co., 30 Conn. 1. And see Steele v. Bank, 60 Ill. 23.

taken with the qualification that the agent whose acts are sought to be imputed to the firm was acting in his character of agent, and not as a principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm, and he alone is liable for them, even though the firm may have benefited by them. Whether a contract is entered into by a partner as such, or by him as an individual, is often, but not always, apparent from the form of the contract.[139]

Sealed Instruments.

The implied power of one partner to bind the firm by sealed instruments has already been considered.[140] When such an instrument is executed by the members of a partnership, it is usual for each partner to sign his name, and affix his seal; but one seal for all is sufficient, the single seal being adopted by each partner, and not being the seal of the firm, for that has no seal.[141] And where one partner signed the firm name, and affixed a seal, the other partner who was present and assented was held liable.[142] Where one partner, in executing an instrument for the firm, unnecessarily seals it, the seal may be rejected, and the other partners held as on a bill, note, or simple contract, as the case may be.[143]

Negotiable Instruments.

In controversies involving liability upon promissory notes, bills of exchange, bank checks, and the like, the name of the firm or the names of all the partners must appear to have been expressly subscribed to or indorsed on the instruments, as the case may be, in order that the firm may be held to be bound.[144] If it appears that the part-

139 Lindl. Partn. 176.

140 Ante, p. 222.

141 Witter v. McNiel, 4 Ill. 433; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; McKnight v. Wilkins, 1 Mo. 220; Pike v. Bacon, 21 Me. 280. See, as to form of execution, Berkshire Co. v. Juillard, 75 N. Y. 535.

142 Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; Moore v. Boyd, 15 Ont. C. P. 513.

143 Sweetzer v. Mead, 5 Mich. 107; Tapley v. Butterfield, 1 Metc. (Mass.) 515; Price v. Alexander, 2 G. Greene (Iowa) 427; Gibson v. Warden, 14 Wall. 247. Cf. Purviance v. Sutherland, 2 Ohio St. 478.

144 Drake v. Elwyn, 1 Caines (N. Y.) 184; Graeff v. Hitchman, 5 Watts (Pa.) 454; Beebe v. Rogers, 3 G. Greene (Iowa) 319; Michael v. Workman, 5 W. Va.

ner has written only his own name in signing or indorsing the paper, then nobody but himself has become bound by his act.[145] The persons taking a note which fails to bind the firm may repudiate it if it is dishonored,[146] or if taken in conditional payment.[147] A partner is bound solely when he has written some name by which the firm cannot be held;[148] but the firm is bound if the firm name has merely been written in an incorrect form, provided the variation is not substantial; and it is bound even then if it has habitually used or sanctioned the use of the wrong name.[149] A partner in separate firms, both having the same name, is liable to be sued on the obligations of both; but the liability of a partner in but one of these firms will depend on the authority, as agent of this particular firm, of the person by whom the obligation was signed or indorsed, and also on the identification of this firm as the obligor intended.[150]

Simple Contracts.

In transactions other than those evidenced by commercial paper, the name of the firm expressly employed is not essential to the liability of the partnership, if the agency for the firm transpires suffi-

391; Emly v. Lye, 15 East, 7; Faith v. Richmond, 11 Adol. & E. 339. But see Bottomley v. Nuttall, 5 C. B. (N. S.) 122; Denton v. Rodie, 3 Camp. 493; Dunnica v. Clinkscales, 73 Mo. 500; Heenan v. Nash, 8 Minn. 407 (Gil. 363).

145 Le Roy v. Johnson, 2 Pet. 186; National Bank v. Thomas, 47 N. Y. 15; Green v. Tanner, 8 Metc. (Mass.) 411; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Siegel v. Chidsey, 28 Pa. St. 279; Graeff v. Hitchman, 5 Watts. (Pa.) 454; Brozee v. Poyntz, 3 B. Mon. (Ky.) 178; Owen v. Van Uster, 20 Law J. C. P. 61; Gates v. Hughes, 44 Wis. 332.

146 First Nat. Bank v. Morgan, 73 N. Y. 593; Claflin v. Ostrom, 54 N. Y. 581; Adler v. Foster, 39 Mich. 87.

147 Claflin v. Ostrom, 54 N. Y. 581; Titus v. Todd's Adm'r, 25 N. J. Eq. 458. And see Goodspeed v. Plow Co., 45 Mich. 237, 7 N. W. 810; Turnbow v. Broach, 12 Bush. (Ky.) 455.

148 Palmer v. Stephens, 1 Denio (N. Y.) 471; Hambro v. Official Manager, 3 Hurl. & N. 789; Faith v. Richmond, 11 Adol. & E. 339; Kirk v. Blurton, 9 Mees. & W. 284.

149 Kinsman v. Dallam, 5 T. B. Mon. (Ky.) 382; Williamson v. Johnson, 1 Barn. & C. 146; Lloyd v. Ashby, 2 Barn. & Adol. 17. Cf. Carney v. Hotchkiss, 48 Mich. 276, 12 N. W. 182.

150 Miner v. Downer, 19 Vt. 14; Cushing v. Smith, 43 Tex. 261; Swan v. Steele, 7 East, 210.

ciently from the facts in each case surrounding the transaction. It frequently happens that the liability of the firm becomes a question in cases where the name of the firm has not appeared at all, and, but for the aid afforded by such facts, the act might be that of the person alone apparent at the time, where even there has been no actual purpose to conceal the fact that the firm is the real party concerned.[151] The cases where such a purpose was present are governed by the general law of principal and agent, the rule as to undisclosed principal being invariably invoked. This rule is that the party aggrieved by the concealment has his election between holding the other personally liable or proceeding against his principal upon the agency being disclosed.[152]

Firm Benefited by Partner's Contract.

It is an erroneous, but popular, notion that, if a firm obtains the benefit of a contract made with one of the partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of a contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm,[153] such circumstance is no more than evidence that this was the case; and the question upon which the liability or nonliability of the firm upon a contract depends is not, has the firm obtained the benefit of the contract, but did the firm, by one of its partners or otherwise, enter into the contract.[154]

Same—Money Borrowed by One Partner.

So, in ordinary cases, when one partner borrows money without the authority of his co-partners, the contract of loan is with him, and not with the firm; and the nature of that contract is not al-

151 Clement v. Assurance Co., 141 Mass. 298, 5 N. E. 847; Beekham v. Drake, 9 Mees. & W. 79; s. c., sub nom. Drake v. Beekham, 11 Mees. & W. 315.

152 Morse v. Richmond, 97 Ill. 303; Howell v. Adams, 68 N. Y. 314; Reynolds v. Cleveland, 4 Cow. (N. Y.) 282; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; McNair v. Rewey, 62 Wis. 167, 22 N. W. 339; Vere v. Ashby, 10 Barn. & C. 288.

153 Beekham v. Drake, 9 Mees. & W. 100, per Rolfe, B. And see Duncan v. Lewis, 1 Duv. (Ky.) 183; Lincoln Sav. Bank v. Gray, 12 Lea (Tenn.) 459.

154 Atwood v. Lockhart, 4 McLean, 350, Fed. Cas. No. 642; Brooke v. Evans, 5 Watts (Pa.) 196; Donnally v. Ryan, 41 Pa. St. 306; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Wittram v. Van Wormer, 44 Ill. 525; Watt v. Kirby, 15 Ill. 200.

tered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit,[155] unless he can bring himself within the equitable doctrine referred to below.

Same—Goods Supplied to One Partner.

The same rule applies to goods, services, and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent, as well as of his real, authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation towards that person by reason of the circumstance that it gets the benefit of what he has done.[156]

Same—Misappropriation of Trust Funds.

The principle of these decisions governs those cases in which one partner, in breach of trust, but without the knowledge or consent of his co-partners, applies trust money over which he has control as a trustee to the purposes of the firm. The fact that the firm has been benefited by the money in question does not necessarily render it liable to the owners of the money.[157]

Same—Equitable Doctrine in These Cases.

Where, however, money borrowed by one partner in the name of the firm, but without the authority of his co-partners, has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied; and the same rule extends to money bona fide borrowed and applied for any other legitimate purpose of the firm.[158] This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose

155 Green v. Tanner, 8 Metc. (Mass.) 411; Willis v. Bremner, 60 Wis. 622, 19 N. W. 403; National Bank v. Thomas, 47 N. Y. 15; Graeff v. Hitchman, 5 Watts (Pa.) 454; Le Roy v. Johnson, 2 Pet. 186.

156 Wittram v. Van Wormer, 44 Ill. 525; Morlitzer v. Bernard, 10 Heisk. (Tenn.) 361.

157 Ex parte Apsey, 3 Brown, Ch. 265; Ex parte Heaton, Buck, 386.

158 Ex parte Chippendale, 4 De Gex, M. & G. 19; Blackburn Building Soc. v. Cunliffe, 22 Ch. Div. 61; Baroness Wenlock v. River Dee Co., 19 Q. B. Div. 155.

claims have been paid off by his money, and partly on the right of the borrowing partner to be indemnified by the firm against liabilities bona fide incurred by him for the legitimate purpose of relieving the firm from its debts, or of carrying on its business. The equitable doctrine in question is limited in its application to cases falling under one or other of the principles above indicated.[159]

SAME—IN TORT.

105. In order that responsibility be attached to a partner with respect to a tort, it is necessary either

(a) That he should have authorized it or joined in its commission in the first instance;

(b) That he should have made it his own by adoption; or

(c) That it should have been committed by his co-partner in the course and as a part of his employment.[160]

Where a partner authorizes the commission of a tort, he has done it himself, and is of course liable. So, where he joins in its commission, his liability is rather that of a joint tort feasor pure and simple, because of participation, than that of a partner, because of relationship.[161] Indeed, the partnership relation would have no connection as cause of the wrongdoing. Retention of benefit derived from a partner's unauthorized tort will attach liability to all partners.[162] The only questions involving difficulty as to the liability of partners, therefore, are those where the liability arises from the relationship. It has been recognized generally by text writers that the law of partnership is a branch of the law of agency. Consequently, it is said that a partner, like a principal, is not liable for the willful acts of his co-partner, if not done in course of his em-

159 Lindl. Partn. 191.

160 Lindl. Partn. § 299.

161 Graham v. Meyer, 4 Blatchf. 129, Fed. Cas. No. 5,672; 24 Meyer, Fed. Dec. 131.

162 Ante, p. 209, "Joint Tort Feasors"; U. S. v. Baxter, 46 Fed. 350; Bienenstok v. Ammidown (Super. N. Y.) 29 N. Y. Supp. 593.

ployment, and as part of the business; and this is true not only of assault, battery, libel, and the like, but also of fraud.[163]

A firm of butchers, one member of which, in furtherance of the partnership, by negligence causes poisoned meat to be placed where dogs might reasonably be expected to get it, is liable to an owner of a dog which dies from eating such meat.[164] When one partner procures goods by false representations, and fraudulently disposes of them, all the partners are jointly liable.[165] Where one member of a firm, holding a chattel mortgage on the goods of a person in default, forcibly enters the premises of the mortgagor, and by force takes possession of the mortgaged property, and in doing so commits an assault upon the mortgagor, his co-partner is not liable in damages for the assault.[166] Fraud on the part of one partner in procuring a note is available as a defense to an action thereon by the firm.[167]

As to what is so within and a part of the business as to attach liability to a co-partner, the cases may not have gone as far towards holding to a mutual responsibility as in the case of master and servant. It has, however, been held that, if one of several partners drive a coach negligently, a person injured thereby may sue the driver in trespass, or all the partners in case.[168] Partners are jointly liable for statements made by one of them in derogation of a competitor, in aid of their business,[169] for misrepresentation as to lands exchanged,[170] for abuse of trust funds,[171] for death by the

163 Lindl. Partn. § 299; Cooley, Torts, pp. 535, 536; Ewell's Evans on Agency, p. 180; Stockwell v. U. S., 3 Cliff. 284, Fed. Cas. No. 13,466.

164 Dudley v. Love, 1 Mo. App. Rep'r, 185.

165 Banner v. Schlessinger (Mich.) 67 N. W. 116.

166 Titcomb v. James, 57 Ill. App. 296.

167 Kilgore v. Bruce (Mass.) 44 N. E. 108.

168 Moreton v. Harderr, 4 Barn. & C. 223; Ashworth v. Stanwix, 30 L. J. Q. B. 183. So, where two attorneys are in partnership, both are liable for the unsuccessful conduct of client's business. Warner v. Griswold, 8 Wend. 665; Poole v. Gist, 4 McCord, 259. And see Rhodes v. Moules [1895] 1 Ch. 236; Dudley v. Love, 60 Mo. App. 420.

169 Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073.

170 Stanhope v. Swafford, 80 Iowa, 45, 45 N. W. 403. And see Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818.

171 Appeal of Rau, 144 Pa. St. 304, 22 Atl. 740. Cf. Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670.

wrongful act of a co-partner,[172] and for an illegal agreement to pay rebate.[173] Similarly, where one partner acts for the firm in demanding illegal charges and detaining the goods until they are paid, every member of the firm is liable in damages.[174]

As to what is not within the course, and not a part, of partnership business, it would appear that a partner is not liable for the willful act of his partner, not because it is willful, but because it is outside of the partnership business.[175] Thus, one partner is not liable for malicious prosecution instituted by his co-partner for the larceny of partnership property, unless he advised or participated in it, and then only in his individual capacity.[176] While, as has been shown, the partner may be liable for the libelous words of a co-partner, still the co-partner may, in connection with the business, publish a libel for which the only responsibility is his individually. Thus, where a furniture company placarded furniture: "Taken back from Doctor W., as he could not pay for it. For sale at a bargain. Moral: Beware of dead beats!"—this libel was held to be the act of the individual. It had nothing to do with the partnership. The partners other than the one actually publishing it were not liable, unless in some way they authorized the publication.[177] A co-partner is, of course, not liable for the conversion by another partner to his own use of a third person's property.[178] In case several persons are sued as partners for a tort, and no partnership is established, the verdict may be against one only, if the tort is established against him.[179] Even for torts, where liability is attached to partners because of wrong done in course

172 Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pa. 187.

173 McEwen v. Shannon, 64 Vt. 583, 25 Atl. 661.

174 Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257.

175 1 Bates, Partn. § 467.

176 Marks v. Hastings, 101 Ala. 165, 13 South. 297; Farrell v. Freidlander, 63 Hun, 254, 18 N. Y. Supp. 215.

177 Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Blyth v. Fladgate (1891) 1 Ch. 337. But see Bienenstok v. Ammidown, supra.

178 Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126; Townsend v. Hagar, 19 C. C. A. 256, 72 Fed. 949. Liability in replevin. Tanco v. Booth (Com. Pl. N. Y.) 15 N. Y. Supp. 110.

179 Austin v. Appling, 88 Ga. 54, 13 S. E. 955. And see Fay v. Davidson, 13 Minn. 523 (Gil. 491).

of partnership business, the injured party may sue all the partners, or any one or more of them, at his election.[180]

JOINT AND SEVERAL LIABILITY.

106. On firm contracts the partners are jointly liable only, unless the contract expressly imposes a several liability.

107. In some states, by statute, partners are made jointly and severally liable.

108. For torts the partners are both jointly and severally liable.

Contracts.

Each co-partner is bound for the entire amount due on co-partnership contracts;[181] and this obligation is so far several that if he is sued alone, and does not plead the nonjoinder of his co-partners, a recovery may he had against him for the whole amount due upon the contract,[182] and a joint judgment against the co-partners may be enforced against the property of each.[183] But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements,—that of each contractor individually, and that of all jointly; and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking.[184] But in co-partnerships there is no such several liability of the co-partners. The co-partnerships are formed for joint purposes. The members undertake joint enterprises; they

[180] Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412, collecting cases at page 16, 142 Ill., and page 412, 31 N. E.; Walker v. Trust Co., 72 Hun, 334, 25 N. Y. Supp. 432. Cf. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632.

By far the ablest and clearest discussion of the liability of a partner, general and special, for the torts of a co-partner is to be found in chapter 9 of Principles of Partnership, by James Parsons (1889).

[181] Judd Linseed & Sperm Oil Co. v. Hubbell, 76 N. Y. 543; Morrell v. Insurance Co., 10 Cush. 282; Waugh v. Carver, 2 H. Bl. 235.

[182] Barry v. Foyles, 1 Pet. 311. [183] Post, p. 249. [184] Clark, Cont. 603.

assume joint risks; and they incur in all cases joint liabilities.[185] In all co-partnership transactions this common risk and liability exist. Therefore it is that, in suits upon these transactions all the co-partners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and, if not brought in, the omission may be pleaded in abatement.[186] The partners may, of course, so word their contracts that they will be jointly and severally liable.[187]

Same—Release of One Partner.

A release of one partner from a partnership debt discharges all the others;[188] for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all.[189]

Same—Covenant not to Sue.

But in this respect a covenant not to sue differs from a release; for although, where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant.[190] If a release is so drawn as to show that it was intended to inure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the

185 That partnership notes are joint only, see Crosby v. Jeroloman, 37 Ind. 264; Brown v. Fitch, 33 N. J. Law, 418.

186 Mason v. Eldred, 6 Wall. 231; Fish v. Gates, 133 Mass. 441; Dob v. Halsey, 16 Johns. (N. Y.) 34; Page v. Brant, 18 Ill. 37; Stutts v. Chafee, 48 Wis. 617, 4 N. W. 763; Adams v. May, 27 Fed. 907.

187 See Beresford v. Browning, 1 Ch. Div. 30.

188 Tuckerman v. Newhall, 17 Mass. 581; Evans v. Carey, 29 Ala. 99; U. S. v. Thompson, Gilp. 614, Fed. Cas. No. 16,487; Ex parte Slater, 6 Ves. 146; Bower v. Swadlin, 1 Atk. 294.

189 Clark, Cont. 557; Wiggin v. Tudor, 23 Pick. 434.

190 Goodnow v. Smith, 18 Pick. 414; Kenworthy v. Sawyer, 125 Mass. 28; Dean v. Newhall, 8 Term R. 168; Walmesley v. Cooper, 11 Adol. & E. 216; Hutton v. Eyre, 6 Taunt. 289.

deed will itself show that it was not, in fact, intended to operate as a release.

Same—Judgment against One Partner.

A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced.[191] When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation. They cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.[192]

Same—Joint and Several Liability by Statute.

"Joint contracts or contracts which would be joint by the common law are in many states declared to be construed as joint and several." [193] These statutes apply to contracts made by partners.[194]

Torts.

For torts imputable to a firm, all the partners are liable jointly and severally.[195] To this general rule an exception occurs where an action ex delicto is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally.[196]

191 Mason v. Eldred, 6 Wall. 231; Smith v. Black, 9 Serg. & R. (Pa.) 142; Olmstead v. Webster, 8 N. Y. 413; Robertson v. Smith, 18 Johns. (N. Y.) 459.

192 Mason v. Eldred, 6 Wall. 231.

193 1 Stim. Am. St. Law, §§ 4113, 5014, 5015.

194 Neil v. Childs, 10 Ired. (N. C.) 195; Burgen v. Dwinal, 11 Ark. 314; Williams v. Mutherbaugh, 29 Kan. 730. The following states have changed the liability of partners into a joint and several liability: Alabama, Arkansas, Colorado, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Tennessee.

195 Linton v. Hurley, 14 Gray (Mass.) 191; Wood v. Luscomb, 23 Wis. 287; Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713; Mitchell v. Tarbutt, 5 Term R. 649.

196 Lindl. Partn. 198, citing 1 Wm. Saund. 291f, 291g.

Same—Distinction between Torts and Breaches of Contract.

Although for general purposes it may be convenient to distribute acts and forbearances which give rise to obligations under the heads breach of contract and tort, it would not be difficult to show the impossibility of always distinguishing between the two. And yet if a breach of a contract binding on the firm imposes a joint liability only on its living members, while a tort imputable to the firm imposes a joint and several liability, the importance of being able accurately to distinguish between a breach of contract and a tort becomes apparent. The difficulty, however, of doing so, is increased by the doctrine that there are cases in which the same breach of an obligation may be regarded from two different points of view, and may, at the option of the person injured, be made the foundation either of an action ex contractu or of an action ex delicto.[197] Suppose, for example, that property is intrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so intrusted. This breach of duty is a breach of the contract, which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract, amounting, in effect, to a conversion or destruction of that which belonged to the customer.[198]

Same—Breaches of Trust.

In equity, the misapplication of the money is a breach of trust, and imposes a joint and several liability on all the partners, on the ground that each partner is bound to see to the proper application of what is intrusted to the firm.[199] In such cases as these, the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others.[200] If the act in question imposes a liability which, upon the principles of agency,

197 Brown v. Boorman, 11 Clark & F. 1; Fleming v. Railway Co., 4 Q. B. Div. 81.

198 1 Lindl. Partn. 199.

199 Nisbet v. Patton, 4 Rawle (Pa.) 120; Plumer v. Gregory, L. R. 18 Eq. 621.

200 Brydges v. Branfill, 12 Sim. 369.

can be imputed to the firm, each member thereof is, in equity, severally liable for such act, just as much as if there had been no fraud in the case; and it is well established in equity that a breach of trust which is imputable to several persons imposes upon them a liability which is both joint and several.[201]

EXTENT OF LIABILITY.

109. Each partner is liable for the whole amount of the partnership debts.

By the common law, every member of an ordinary partnership is liable in solido for the debts and engagements of the firm. The law ignoring the firm as anything distinct from the persons composing it treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly.[202] Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners ratably, but he may select any one or more of them, and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves.[203] Limited partnerships, in which some of the partners are not liable for the whole amount of the firm obligations, will be considered in a subsequent chapter.[204]

201 Guillou v. Peterson, 89 Pa. St. 163; Colt v. Lasnier, 9 Cow. (N. Y.) 320.

202 Benchley v. Chapin, 10 Cush. (Mass.) 173; Allen v. Owens, 2 Spears (S. C.) 170; Nebraska Ry. Co. v. Lett, 8 Neb. 251. The firm is liable in solido for the torts of one partner if committed by him as a partner, and in the course of the partnership business. Loomis v. Barker, 69 Ill. 360.

203 Dean v. Phillips, 17 Ind. 406.

204 Post, p. 417, c. 10.

BEGINNING OF LIABILITY.

110. As to the beginning of the liability of partners, the following are the principal rules:

(a) There is no liability as partners before the firm is formed (p. 250).

(b) There may be liability before the partnership articles are executed (p. 250).

(c) The firm is not liable for what a partner does before he joins it (p. 251).

Formation of Partnership.

The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way is based upon the ground that the ordinary business of a firm cannot be carried on either to the advantage of its members or with safety to the public, unless such a doctrine is recognized. The existence of a partnership is therefore evidently presupposed; and although persons negotiating for a partnership, or about to become partners, may be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners.[205]

Execution of Articles Deferred.

But, although this is undoubted law, still if persons agree to become partners as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they, nevertheless, commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed. For the question in such a case is not, when was the deed executed, but rather this, when did the partners commence to carry on business as such. The agency begins from that time, whether they choose to execute any partner-

[205] Irwin v. Bidwell, 72 Pa. St. 244; Brink v. Insurance Co., 5 Rob. (N. Y.) 104; Davis v. Evans, 39 Vt. 182; Edmundson v. Thompson, 2 Fost. & F. 564, Gabriel v. Evill, 9 Mees. & W. 297.

ship deed or not.[206] Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement.[207]

Acts of One not Yet a Partner.

The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for what may be done by any partner before he becomes a member thereof. So that, if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him;[208] and the fact that the money or goods so supplied have been brought in by him as agreed will not render the firm liable.[209]

SAME—INCOMING PARTNER.

111. An incoming partner is not liable for previous debts and engagements of the old firm, except

EXCEPTION—Where he assumes them.

As the firm is not liable for what is done by its members before the partnership between them commences, so, upon the very same principle, a person who is admitted as a partner into an existing firm does not, by his entry, become liable to the creditors of the firm for anything done before he became a partner.[210] Each partner is, it is true, the agent of the firm; but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and, when a new member is admitted, he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratifica-

206 Lindl. Partn. 202.

207 Williams v. Jones, 5 Barn. & C. 108.

208 See ante, pp. 229, 232. And cf. Heap v. Dobson, 15 C. B. (N. S.) 460; Smith v. Craven, 1 Cromp. & J. 500.

209 Brooke v. Evans, 5 Watts (Pa.) 196; Heap v. Dobson, 15 C. B. (N. S.) 460.

210 Mellor v. Lawyer, 55 Ill. App. 679.

tion by him of what his now partners may have done before he joined them.[211] But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done on his behalf.[212]

112. ASSUMPTION OF DEBTS—The law as to the liability of an incoming partner where there has been an assumption of debts is in a very unsettled condition.

113. In some jurisdictions the incoming partner is not liable to creditors unless the creditors are parties to the agreement by which the debts are assumed.

114. In other jurisdictions the incoming partner is held liable to creditors although they were not parties to the agreement assuming their debts, on the theory that the contract was made for their benefit. The precise limits of this doctrine are unsettled.

There is a good deal of confusion and conflict in the decisions upon the liability of an incoming partner under an agreement to assume debts.* Of course, such an agreement is valid, and may be enforced by any one who is a party to it. The conflict is as to whether or not such an agreement confers any rights upon a creditor who is not a party thereto. The cases may therefore be roughly divided into two classes: (1) Those which hold that a creditor cannot maintain an action against the incoming partner on his agreement to assume debts, and (2) those which hold that under certain circum-

211 Gould, J., in Horsley v. Bell, 1 Brown, Ch. 101, note.

212 Hughes v. Gross (Mass.) 43 N. E. 1031; Wilson v. Tumman, 6 Man. & G. 236.

* A parol contract by an incoming partner to assume, along with the other member, the debts of the old concern, is binding. J. & H. Clasgens Co. v. Silber (Wis.) 67 N. W. 1122. Where one member of an insolvent firm sells his interest with the agreement that the new firm shall assume the debts of the old, the assets of the new firm are charged in equity with a trust for the payment of the debts of the old, which may be enforced by a creditor of the old firm who has not consented to accept the new firm as his creditor instead of the old. Pinney and Newman, JJ., dissenting. Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007.

stances he may maintain an action on the contract, it being made for his benefit. Each will be considered in turn.

In jurisdictions where the doctrine that a third person can maintain an action on a contract made for his benefit, although he is not a party to it, does not prevail,[213] a creditor who is not a party to the arrangement cannot, of course, maintain an action against an incoming partner upon the latter's agreement to assume the debts of the old firm. This is the view taken in England. It is clearly stated by Lindley,[214] as follows: "If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind that, even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, res inter alios acta, and does not confer upon them any right to fix the old debts on the new partner.[215] In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect, entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner. An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm may be, and in practice generally is, established by indirect evidence. The courts, it has been said, lean in favor of such an agreement, and are ready to infer it from slight circumstances;[216] and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm.[217]

213 Clark, Cont. 513. 214 Partn. 208.

215 See per Parke, J., in Vere v. Ashby, 10 Barn. & C. 288; Ex parte Peele, 6 Ves. 602; Ex parte Williams, Buck, 13.

216 Ex parte Jackson, 1 Ves. Jr. 131; Ex parte Peele, 6 Ves. 602. See, also, Rolfe v. Flower, L. R. 1 P. C. 27.

217 See Cooke, Bankr. Laws (8th Ed.) 534; Ex parte Clowes, 2 Brown, Ch. 595, citing Ex parte Bingham.

But this certainly is not enough, for the agreement to be proved is an agreement with the creditor; and of such an agreement an arrangement between the partners is of itself no evidence." [218]

This view has been taken in many American cases. Thus, in Shoemaker Piano Manuf'g Co. v. Bernard,[219] it was said: "The rule stands upon the principle of assent by the party to be charged, and consent of the creditor to accept the new liability." In Parmalee v. Wiggenhorn,[220] the following language was used: "An incoming partner is not liable for the debts incurred or contracts made before he entered the partnership, unless such liability is created by express contract, based on good consideration. There must be a novation before the new firm is liable; and the new contract must receive the consent of all the parties, and must have the effect to extinguish the old contract, and create a new liability of debtor and creditor, or of contractors, between the creditor or contractor and the new firm, and such new contract must be based on some consideration."

In many of the United States the anomalous doctrine has been established that a person not a party to a contract can maintain an action thereon where it was made for his benefit.[221] The application of this doctrine to cases where an incoming partner has agreed with his co-partners to assume debts of the old firm has resulted in great confusion and conflict. It may clarify the subject somewhat to consider it with reference to the form of the contract by which the debts are assumed. The contract usually takes one of three forms:

(1) The parties may agree that the incoming partner shall pay a certain proportion of the debts of the old firm. It seems clear that, when the agreement takes this shape, no creditor of the old firm can maintain an action on his debt against the incoming partner, either jointly with his co-partners or separately. Such a contract can be enforced against him only by his co-partners with whom it was made. This is for the reason that no one creditor can show from the contract that it was intended for his benefit, or covers any

[218] Ex parte Peele, 6 Ves. 602; Ex parte Parker, 2 Mont., D. & D. 511. See, also, Ex parte Freeman, Buck, 471; Ex parte Williams, Id. 13.

[219] 2 Lea (Tenn.) 358. [220] 6 Neb. 322. [221] Clark, Cont. 513.

part of his debt. In a leading case in New York [222] where this distinction was taken, the court said: "The plaintiffs agreed to pay one-quarter of the firm's indebtedness. If the next day they had ascertained its entire amount, and paid over to Stotenburgh, Root & Co. one-quarter of that total, their contract would have been fulfilled. They would have put back into the firm assets, precisely what they had agreed to give for what was taken out. Or if, again, there were ten creditors, all of whose debts were due, and one of them held one-quarter of the total, the plaintiffs might pay him, and owe nothing to the other nine, or pay a part of the nine, and owe nothing to the rest. In other words, no one nor any specific and identical creditor could so show, in advance of payment, that the promise was intended for his benefit, or covered any part of his debt, as to establish that he could maintain an action on such promise. Whether it would benefit him or not depended wholly upon the undisclosed option of the plaintiffs down to the moment at which they were required to pay 'one-quarter of the indebtedness' of the firm. It would be a very great extension of the doctrine of Lawrence v. Fox [223] to give a right of action to a creditor for whose benefit the promise might or might not have been made." Of course, the same objection would apply to an action against the members of the new firm where the agreement was that the new firm, instead of the new partner, should assume a certain proportion of the debts of the old firm.

(2) The parties may agree that certain specific debts shall be paid by the incoming partner or by the new firm. It seems clear that, when the agreement takes this shape, the creditor specified ought to be allowed to maintain an action against the incoming partner or the members of the new firm, as the case may be, if the doctrine that a third person may sue on a contract made for his benefit is to have any application at all. Thus, in Arnold v. Nichols,[224] it was held that where one engaged in business enters into a co-partnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to

222 Wheat v. Rice, 97 N. Y. 296, followed in Serviss v. McDonnell, 107 N. Y. 260, 14 N. E. 314.

223 20 N. Y. 268; Buchanan v. Tilden (Sup.) 39 N. Y. Supp. 228.

224 64 N. Y. 117, distinguishing Merrill v. Green, 55 N. Y. 270.

assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement.

(3) The parties may agree that all of the debts of the old firm shall be paid by the new firm or by the incoming partner. This form of contract is more definite than the first form considered, where the agreement was simply to pay a given proportion of the debts. Here each and every creditor can say that the contract was made for his benefit. There no creditor could say that it was for his benefit. It seems, therefore, that the same reasons that would support an action where the contract was to pay a specific debt would support an action where the agreement was to pay all the debts of the old firm. In Barlow v. Myers [225] the defendant promised a firm to pay all its debts, without specification of the particular debts, or naming the creditors of the firm, and the holder of a promissory note of the firm was allowed to maintain an action against the defendant alone on such promise.

It is not claimed that all the cases will harmonize with these conclusions, but it is believed that most of them will, and it is submitted that they rest on sound reasoning. Much of the confusion in this subject will be found to be rather in the language of the opinion than in the decision of the case. Thus, in Serviss v. McDonnell,[226] in one part of the opinion the court said: "An incoming partner is not, as of course, liable for the debts of the firm. * * * He may become liable by agreement; but an undertaking on his part alone, or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm, and the creditors could not sue for the breach of it." The decision of the case, however, was rested upon the distinction taken in Wheat v. Rice,[227] that the agreement was to pay only a certain portion of the liabilities of the firm. Wheat v. Rice was regarded as controlling.

[225] 64 N. Y. 41. [226] 107 N. Y. 260, 14 N. E. 314.

[227] 97 N. Y. 296. The opposite doctrine is sometimes laid down in terms equally broad, and equally inexact. See Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; J. & H. Clasgens Co. v. Silber (Wis.) 67 N. W. 1122.

TERMINATION OF LIABILITY.

115. The termination of a partner's liability will be considered, as to

(a) Future acts (p. 257).

(b) Past acts (p. 265).

SAME—FUTURE ACTS.

116. The liability of a partner for future acts of his co-partners is terminated

(a) By dissolution of the firm by operation of law (p. 257).

(b) By dissolution of the firm by act of the partners (p. 259), **provided there is also**

(1) Actual notice to former creditors known to the firm (p. 261).

(2) Notice by publication to other persons (p. 264).

Dissolution by Operation of Law.

When a firm is dissolved [228] by operation of law, as by the death [229] or bankruptcy of a partner,[230] marriage of a feme sole partner,[231] or war between the countries to which the partners belong,[232] the liability of each partner for the future acts of his co-partners is terminated by that fact, without more.[233]

Effect of Death.

When a partner dies, notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease,

228 See post, p. 393.

229 Washburn v. Goodman, 17 Pick. (Mass.) 519.

230 See post, p. 399.

231 Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217.

232 See post, p. 402.

233 If a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his co-partners will remain unaffected. 2 Lindl. Partn. 213. But an inquisition of lunacy found as to one partner, ipso facto, dissolves the partnership. Isler v. Baker, 6 Humph. (Tenn.) 85.

for the authority of an agent is determined by the death of his principal, whether the fact of death is known or not.[234] The death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it.[235] But it does not follow that, because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his co-partners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners, as will be seen hereafter when the subject of dissolution is under consideration.[236]

Same—Executor Continuing Business.

If an executor of a deceased partner carries on the partnership business pursuant to directions contained in the will of his testator, the executor will render himself personally liable for debts contracted in so doing, but he will be entitled to indemnity in respect thereof out of the estate of the deceased;[237] and consequently, if a deceased partner has himself directed his assets or any part thereof to be employed in carrying on the partnership business, so much of them as are directed to be employed are liable to make good the debts contracted during their employment. For these reasons, and to this extent, therefore, his estate will be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease.[238]

[234] Scholefield v. Eichelberger, 7 Pet. 586; Dickinson v. Dickinson, 25 Grat. (Va.) 321; Roberts v. Kelsey, 38 Mich. 602; Marlett v. Jackman, 3 Allen (Mass.) 287; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275. Liability for existing obligation is not terminated by death. Lane v. Williams, 2 Vern. 292. However, if a partner is executor of the estate of a deceased co-partner, the fact of the death should be given out, lest that estate be made liable for transactions of the continuing firm. Vulliamy v. Noble, 3 Mer. 593.

[235] Bank of New York v. Vanderhorst, 32 N. Y. 553; Usher v. Dauncey, 4 Camp. 97.

[236] Post, p. 415.

[237] Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295; Labouchere v. Tupper, 11 Moore, P. C. 198.

[238] Jones v. Walker, 103 U. S. 444; Burwell v. Cawood, 2 How. 560; Cook v.

Dissolution by Act of Partners.

Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member, and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification;[239] nor is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm,[240] even although they may have been dated before the dissolution,[241] or have been given for a debt previously owing from the firm by the partner expressly authorized to get in and discharge its debts. The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are: First, where a partner who has retired, and notified his retirement, nevertheless continues to hold himself out as a partner; and, secondly, where what is done only carries out what was begun before. If a partner retires, and gives notice of his retirement, and he, nevertheless, allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in an earlier part of

Rogers, 3 Fed. 69; Lucht v. Behrens, 28 Ohio St. 231; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295. A testator may provide that his capital and interest in a partnership shall be continued therein after his death, but that his other property shall not be chargeable to partnership debts subsequently incurred. Jones v. Walker, 103 U. S. 144.

239 Schlater v. Winpenny, 75 Pa. St. 321; Minnit v. Whinery, 5 Brown, Parl. Cas. 489. A partner is not, by retiring from the firm, relieved from liability for services rendered thereafter under a contract made before such retirement, though the services were rendered with knowledge that such partner had retired. Merrill v. Blanchard, 7 App. Div. 167, 40 N. Y. Supp. 48.

240 Abel v. Sutton, 3 Esp. 108; Spenceley v. Greenwood, 1 Fost. & F. 297. The mere fact that money loaned to members of a firm after another member's retirement, for which they gave a note in the firm name, was used in paying debts contracted prior to the retirement, did not render the retiring partner liable on the note. Askew v. Silman, 95 Ga. 678, 22 S. E. 573.

241 Wright v. Pulham, 2 Chit. 121; s. c., sub. nom. Wrightson v. Pullan, 1 Starkie, 375.

this book.[242] But if a partner retires, and notice of his retirement is given, he will not continue to incur liability by the acts of his co-partners, simply because they continue to carry on business in the old name, and he does not take steps to stop them.* His forbearance in this respect does not necessarily amount to an authority to use his name as before; and, unless his name is used by his authority, he is not liable on the ground that he holds himself out as a partner.[243] So, notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to

[242] Ante, p. 80. Where a change takes place in a firm by the retirement of some of its members, and the same firm name is used after such retirement, the retiring members can only relieve themselves from liability for the future transactions of the firm by giving actual notice of such retirement to former customers who continue to deal with the firm. As to these, the old partnership is presumed to continue the same as it was when they commenced to deal with it, until in some way they have actual notice of the change. Graham v. Hope, Peake, 154; Page v. Brant, 18 Ill. 37; Holtgreve v. Wintker, 85 Ill. 470; Stall v. Cassady, 57 Ind. 284; Tudor v. White, 27 Tex. 584; Davis v. Willis, 47 Tex. 154; Dickinson v. Dickinson, 25 Grat. (Va.) 321; Little v. Clarke, 36 Pa. St. 114; Kenney v. Altvater, 77 Pa. St. 34; Carmichael v. Greer, 55 Ga. 116; Holland v. Long, 57 Ga. 36; Ennis v. Williams, 30 Ga. 691; Stewart v. Sonneborn, 51 Ala. 126; Shamburg v. Ruggles, 83 Pa. St. 148; Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524; Austin v. Holland, 69 N. Y. 571; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Polk v. Oliver, 56 Miss. 566; Lowe v. Penny, 7 La. Ann. 356; Denman v. Dosson, 19 La. Ann. 9; Pope v. Risley, 23 Mo. 185; Johnson v. Totten, 3 Cal. 343; Williams v. Bowers, 15 Cal. 321; Deering v. Flanders, 49 N. H. 225; Zollar v. Janvrin, 47 N. H. 324; Scheiffelin v. Stevens, 1 Winst. Law (N. C.) 106; White v. Murphy, 3 Rich. Law (S. C.) 369; Hutchins v. Hudson, 8 Humph. (Tenn.) 426; Kirkman v. Snodgrass, 3 Head (Tenn.) 370; Prentiss v. Sinclair, 5 Vt. 149; Moline Wagon Co. v. Rummell, 12 Fed. 658; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625. And see First Commercial Bank v. Talbert, 103 Mich. 625, 61 N. W. 888.

* Freeman v. Falconer, 44 N. Y. Super. Ct. 132; Howe v. Thayer, 17 Pick. (Mass.) 91; Ellis v. Bronson, 40 Ill. 455. But see Newsome v. Coles, 2 Camp. 617. Evidence that before a sale to a firm one of the partners had withdrawn, and his brother had taken his place, is insufficient to relieve the withdrawing partner from liability, where the name of the firm continued the same, and no notice was given of the withdrawal, though defendant alleged that notice was given to plaintiff's agent, which the latter denied. Kerr v. Franks (Ky.) 30 S. W. 1012.

[243] Lindl. Partn. 217; Webster v. Webster, 3 Swanst. 490, note; Newsome v. Coles, 2 Camp. 617.

settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution.[244] But a partner, after dissolution, has no implied power to bind his former partners by an acknowledgment to revive a liability already barred by the statute of limitations.[245] The cases are in conflict as to whether a partner in such case has power to extend the time under the statute as to a debt not yet barred by payment for an acknowledgment.[246] It is established that a surviving partner does not have this power.[247]

Who Entitled to Actual Notice.

All persons are entitled to actual notice of the dissolution of a firm or the retirement of a partner who have previously given credit to the firm in money, goods, or services.[248] The dealing, however, must be with the firm, for there is no obligation to give actual notice to persons who may have relied upon the credit of the firm with-

244 Murray v. Mumford, 6 Cow. (N. Y.) 441; Thursby v. Lidgerwood, 69 N. Y. 198; Moist's Appeal, 74 Pa. St. 166; Yale v. Eames, 1 Metc. (Mass.) 486; Tutt v. Clorey, 62 Mo. 116.

245 Bloodgood v. Bruen, 8 N. Y. 362; Whitney v. Reese, 11 Minn. 138 (Gil. 87); Bell v. Morrison, 1 Pet. 351.

246 That no such power exists is held in Cronkhite v. Herrin, 15 Fed. 888; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Sigler v. Platt, 16 Mich. 206; Wilson v. Waugh, 101 Pa. St. 233; Watson v. Woodman, L. R. 20 Eq. 721; Shoemaker v. Benedict, 11 N. Y. 176; Carlton v. Coffin, 27 Vt. 496. Contra, McClurg v. Howard, 45 Mo. 365; Merritt v. Day, 38 N. J. Law, 32; Wood v. Barber, 90 N. C. 76; Shelton v. Cocke, 3 Munf. (Va.) 191.

247 Bloodgood v. Bruen, 8 N. Y. 362; Espy v. Comer, 76 Ala. 501; Brown v. Gordon, 16 Beav. 302.

248 Dundas v. Gallagher, 4 Pa. St. 205; Howell v. Adams, 68 N. Y. 314; Stall v. Cassady, 57 Ind. 284; Bloch v. Price, 32 Fed. 562; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Stimson v. Whitney, 130 Mass. 591; Clement v. Clement, 69 Wis. 599, 35 N. W. 17; Mulford v. Griffin, 1 Fost. & F. 145; Faldo v. Griffin, Id. 147; Parkin v. Carruthers, 3 Esp. 248; Williams v. Keats, 2 Starkie, 290; Brown v. Leonard, 2 Chit. 120; Dolman v. Orchard, 2 Car. & P. 104; Tabb v. Gist, 1 Brock. 33, Fed. Cas. No. 13,719; Bradley v. Camp, Kirb. (Conn.) 77; Southwick v. McGovern, 28 Iowa, 533; Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Amidown v. Osgood, 24 Vt. 278; Lamb v. Singleton, 2 Brev. (S. C.) 490; Heroy v. Van Pelt, 4 Bosw. (N. Y.) 60; Schorten v. Davis, 21 La. Ann. 173; Dickinson v. Dickinson, 25 Grat. (Va.) 321; Southern v. Grim, 67 Ill. 106; Buffalo City Bank v. Howard, 35 N. Y. 500; Hunt v. Hall, 8 Ind. 215; Newcomet v. Brotzman, 69 Pa. St. 185; Gardner v. Towsey, 3 Litt. (Ky.) 423; Merritt v. Pollys, 16 B. Mon.

out its consent.[249] Thus, there is no obligation to give notice of dissolution to persons who have, without the knowledge or request of the firm, dealt in or discounted its commercial paper.[250] But it is well established that actual notice must be given persons who have loaned money to the firm,[251] or who have sold it goods on credit,[252] no matter how small the amount of the transaction,[253] but not to those who have merely sold goods to the firm for cash.[254] An agent who performs services for a firm after the retirement of a partner can hold that partner, when he had no notice of the change in the firm, as where he is employed in another city.[255]

What is Actual Notice.

As against persons who dealt with the firm before any change in it took place, an advertisement without more is of little or no value.[256] But, if notice in point of fact can be established, it matters not by what means; for it has never been held that any par-

(Ky.) 355; Ketcham v. Clark, 6 Johns. (N. Y.) 144; Grady v. Robinson, 28 Ala. 289; Spears v. Toland, 1 A. K. Marsh. (Ky.) 203; Thurston v. Perkins, 7 Mo. 29; Princeton & Kingston T. Co. v. Gulick, 16 N. J. Law, 161; Bernard v. Torrance, 5 Gill & J. (Md.) 383. See, however, Brisban v. Boyd, 4 Paige (N. Y.) 17; Regester v. Dodge, 6 Fed. 6. After dissolution and notice the power of each partner to bind the others ceases. See Cronly v. Bank, 18 B. Mon. (Ky.) 405; Whitesides v. Lee, 1 Scam. (Ill.) 548; Lane v. Tyler, 49 Me. 252. It is of course assumed, in what has been above written, that, after a firm is dissolved, one partner dealing with a person who has no notice of the dissolution may bind his co-partners only in transactions in the usual course of business. Whitman v. Leonard, 3 Pick. (Mass.) 177.

249 City Bank of Brooklyn v. McChesney, 20 N. Y. 241; Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183; Hutchins v. Bank, 8 Humph. (Tenn.) 418.

250 Id.

251 Buffalo City Bank v. Howard, 35 N. Y. 500; Jansen v. Grimshaw, 26 Ill. App. 287. Depositors with a firm of bankers come within this class, Howell v. Adams, 68 N. Y. 314; as do also factors who have made advances to a firm, Williams v. Birch, 6 Bosw. (N. Y.) 299.

252 Clapp v. Rogers, 12 N. Y. 283; Amidown v. Osgood, 24 Vt. 278.

253 Clapp v. Rogers, 12 N. Y. 283.

254 Merritt v. Williams, 17 Kan. 287; Clapp v. Rogers, 12 N. Y. 283.

255 Austin v. Holland, 69 N. Y. 571. But see Costello v. Nixdorff, 9 Mo. App. 501.

256 Watkinson v. Bank, 4 Whart. (Pa.) 482; Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183; Zollar v. Janvrin, 47 N. H. 324; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817; Graham v. Hope, 1 Peake, 154.

ticular formality must be observed.[257] If an old customer can be shown to have seen an advertisement, that will be sufficient; and evidence that he took a certain paper is some evidence that he knew of a dissolution advertised therein.[258] Again, general notoriety, a change in the name of the firm, and advertisements, coupled with the execution of powers of attorney to the new firm, have been held to warrant the jury in finding knowledge by an old customer of a change in the old firm.[259] So, in the case of bankers, a change in the name of the firm appearing on the face of the checks used by their customers has been held sufficient notice to an old customer who had drawn checks in the new form.[260]

[257] Le Roy v. Johnson, 2 Pet. (U. S.) 186; Roberts v. Spencer, 123 Mass. 397. It makes no difference how notice is given, so that actual notice of a change in the firm is brought home to the former correspondents. Holtgreve v. Wintker, 85 Ill. 471; Solomon v. Hollander, 55 Mich. 256, 21 N. W. 336. But see Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817. Notice of the dissolution may be shown either by direct or circumstantial evidence sufficient to establish the fact that the person seeking to enforce the partnership liability knew of the dissolution. See Laird v. Ivens, 45 Tex. 622; Lovejoy v. Spafford, 93 U. S. 430; Coddington v. Hunt, 6 Hill (N. Y.) 595; Mauldin v. Branch Bank, 2 Ala. 502. Circumstances such as leave no rational doubt in the mind that one knew of the dissolution are as satisfactory as direct and positive proof. Irby v. Vining, 2 McCord (S. C.) 379. Knowledge of any facts, however acquired, sufficient to put an ordinarily prudent man upon inquiry, will charge one knowing such facts with notice of whatever other facts a reasonable investigation would have disclosed. See Young v. Tibbitts, 32 Wis. 79; Ransom v. Lovless, 49 Ga. 471. Evidence that plaintiffs were subscribers to, and received, commercial reports which reported the dissolution of a firm, is competent, as tending to show knowledge of the dissolution. Homberger v. Alexander (Utah) 40 Pac. 260.

[258] Rabe v. Wells, 3 Cal. 148; Jenkins v. Blizard, 1 Starkie, 418; Whitesides v. Lee, 2 Ill. 550.

[259] Hart v. Alexander, 2 Mees. & W. 484. But see Pitcher v. Barrows, 17 Pick. (Mass.) 361. A change in the partnership name which plainly indicates the withdrawal of a partner is sufficient notice of the fact of such withdrawal to all persons to whom it is communicated, but a change in the name which does not contain such communication is not notice of the withdrawal of any partner. California: Deering's Civ. Code 1886, § 2454. Dakota: Civ. Code 1883, § 1437. North Dakota: Rev. Code 1895, § 4403.

[260] Barfoot v. Goodall, 3 Camp. 147.

Notice by Publication—Nondealers.

Public notice of the retirement of a partner given by publication in a newspaper published at the place where the business of the firm is carried on is sufficient, not only against all who can be shown to have seen it,[261] but also against all who had no dealings with the old firm, whether they saw it or not.[262] Nondealers with the firm may be given sufficient notice by a change in the firm name which shows the retirement of a partner.[263] In some cases notoriety of the change in the firm has been held equivalent to published notice.[264] Notice is, of course, unnecessary when actual knowledge is shown in any way.[265]

117. DORMANT PARTNER—When a dormant partner retires, he need give no notice to relieve himself from future liability.

When a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts

261 Lyon v. Johnson, 28 Conn. 1; Shurlds v. Tilson, 2 McLean, 458, Fed. Cas. No. 12,827; Watkinson v. Bank, 4 Whart. (Pa.) 482.

262 Shurlds v. Tilson, 2 McLean, 458, Fed. Cas. No. 12,827; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Austin v. Holland, 69 N. Y. 571; Ellis v. Bronson, 40 Ill. 455. Persons having no knowledge of a partnership are not entitled to notice of its dissolution. Chamberlain v. Dow, 10 Mich. 319. And, as to all persons who have not had dealings with the firm, notice of the dissolution by publication in some newspaper of general circulation is sufficient, whether such notice is seen by the parties to be charged therewith or not. Godfrey v. Turnbull, 1 Esp. 371; Wrightson v. Pullan, 1 Starkie, 375; Godfrey v. Macauley, 1 Peake, 209; Newsome v. Coles, 2 Camp. 617; Shurlds v. Tilson, supra; Watkinson v. Bank, supra; Galliott v. Bank, 1 McMul. (S. C.) 209; Mauldin v. Bank, 2 Ala. 502; Lucas v. Bank, 2 Stew. (Ala.) 280; Lansing v. Gaine, supra; Prentiss v. Sinclair, 5 Vt. 149; Graves v. Merry, 6 Cow. 701; Polk v. Oliver, 56 Miss. 566; Simonds v. Strong, 24 Vt. 642; Martin v. Searles, 28 Conn. 43; Martin v. Walton, 1 McCord (S. C.) 16.

263 Coggswell v. Davis, 65 Wis. 191, 26 N. W. 557; Holdane v. Butterworth, 5 Bosw. (N. Y.) 1.

264 Lovejoy v. Spafford, 93 U. S. 430; Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Hart v. Alexander, 2 Mees. & W. 484. But cf. Goddard v. Pratt, 16 Pick. (Mass.) 412; Martin v. Searles, 28 Conn. 43.

265 Whitesides v. Lee, 2 Ill. 550; Howe v. Thayer, 17 Pick. (Mass.) 91.

done after his retirement.[266] The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith. If a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must therefore give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners.[267]

SAME—PAST ACTS.

118. The liability of a partner for past acts and obligations of the partnership is terminated by

(a) Payment (p. 265).
(b) Release (p. 268).
(c) Novation (p. 269).
(d) Merger (p. 271).

Payment—By One Partner.

Payment of a partnership debt by any one partner discharges all the others, if the object of the partner paying was to extinguish the whole debt, or if he made the payment out of the partnership funds.[268] But if a firm is unable to pay a debt, and one partner out of his moneys pays it, but in such a way as to show an intention to keep the debt alive against the firm for his own benefit, this payment by him will be no answer to an action brought against the firm by the creditor suing on behalf of the partner who made the payment.[269] If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner, with the moneys of the firm,

266 Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Carter v. Whalley, 1 Barn. & Adol. 11; Davis v. Allen, 3 N. Y. 168; Armstrong v. Hussey, 12 Serg. & R. 315; Ellis v. Bronson, 40 Ill. 455; Nussbaumer v. Becker, 87 Ill. 281; Warren v. Ball, 37 Ill. 81; Gorman v. Davis & Gregory Co. (N. C.) 24 S. E. 770; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Grosvenor v. Lloyd, 1 Metc. (Mass.) 19.

267 Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Nussbaumer v. Becker, 87 Ill. 281; Park v. Wooten's Ex'rs, 35 Ala. 242; Shamburg v. Ruggles, 83 Pa. St. 148.

268 Colgrove v. Tallman, 2 Lans. (N. Y.) 97.

269 McIntyre v. Miller, 13 Mees. & W. 725.

makes a payment to the creditor, without specifying the account on which it is paid, the payment must be taken to have been made on the partnership account, if made out of partnership funds.[270]

Same—By New Firm.

If a firm is indebted, and, by the retirement of the original partners, and the introduction of other partners, a wholly new firm is called into existence, a payment by the new firm, expressly or impliedly, on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm, and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm.[271]

Same—Application of Payments.

The usual rules governing the application of payments[272] apply to payments by partners. Of these rules the most important, with reference to the subject-matter of the present treatise, is that which is known as the "Rule in Clayton's Case,"[273] that where there is one single open current account between two parties, every payment which cannot be shown to have been made in discharge of some particular item is imputed to the earliest item standing to the debit of the payer at the time of payment. If, therefore, a customer of a firm of bankers has funds standing to his credit at the time they dis-

[270] Thompson v. Brown, Moody & M. 40.

[271] 1 Lindl. Partn. 226.

[272] See Clark, Cont. 634. A check of a firm delivered to a creditor of both the firm and the member thereof who delivered the check will be deemed to have been given in payment of the firm debt, though that debt was not due at the time of delivery, and the debt of the member was overdue, where there is no evidence that the firm consented that the check should be given in payment of the partner's debt. Rogers v. Betterton, 93 Tenn. 630, 27 S. W. 1017. Where an insurance agent, who was indebted to his company, took in a partner, and the partnership thereafter represented the company, and opened new books, and kept its business separate from that formerly done by the agent, payments made to the company during the existence of the partnership could not be applied to the agent's individual debt, as against his co-partner. Hoffman v. Smith (Iowa) 63 N. W. 182.

[273] 1 Mer. 572.

solve partnership, and his account is continued by their successors, they taking new deposits and honoring his drafts as if no change had occurred, and blending the accounts, then the payments first made by the new firm will be deemed to have been made in liquidation of the earliest item on the credit side of the customer's account, viz. the balance due to him at the time of the dissolution; and, consequently, if, proceeding on this principle, that balance is liquidated, the customer has no claim against the old firm in respect of his account with them.[274]

This doctrine is of great importance in questions relating to the discharge of retired and deceased partners. The application of the rule in question will discharge from liability the estates of deceased partners;[275] the estates of sole traders, if their business has been carried on by others with any break;[276] and retired partners, whether known[277] or dormant.[278] Moreover, the discharge of the deceased or retired partner being the consequence of the payment to his former creditor, the discharge does not depend on the knowledge of the creditor of the change which has taken place in the firm.[279]

This has an important bearing on the position of incoming partners; for, although they are not liable for debts contracted before they joined the firm, still, if such debts, and others subsequently contracted, are allowed by an incoming partner to form one single running account, and payments are made generally in respect of it, those payments, although made with the money of the new firm, will be applied to the old debt, and a balance will be left for which the incoming partner will be liable.[280] But the rule in Clayton's Case cannot be insisted on to the prejudice of a new partner without his consent, express or tacit. Without such consent, a creditor of the old firm who goes on dealing with the new firm has no

274 See Allen v. Smelting Co., 73 Mo. 688; Whitwell v. Warner, 20 Vt. 425.

275 See Sterndale v. Hankinson, 1 Sim. 393; Clayton's Case, 1 Mer. 572.

276 Smith v. Wigley, 3 Moore & S. 174; Sterndale v. Hankinson, 1 Sim. 393.

277 Allcott v. Strong, 9 Cush. (Mass.) 323; Wiesenfeld v. Byrd, 17 S. C. 106; Hooper v. Keay, 1 Q. B. Div. 178. But see Baker v. Stackpoole, 9 Cow. (N. Y.) 420.

278 Newmarch v. Clay, 14 East. 239; Brooke v. Enderby, 2 Brod. & B. 70.

279 Pardee v. Markle, 111 Pa. St. 548, 5 Atl. 36; Scott v. Beale, 6 Jur. (N. S.) 559.

280 Scott v. Beale, 6 Jur. (N. S.) 559.

right to appropriate a payment made by a new partner to a debt owing by his co-partners, nor to run two distinct accounts together, and treat a general payment as made in respect of the earliest items.[281]

The rule in Clayton's Case, however, applies only to an entire unbroken account, and has no application to cases where one person is indebted to another in respect of several matters, each of which forms the subject of a distinct account.[282] Nor does the rule apply to defeat the intention of the parties. If it can be shown that some other appropriation was intended, the rule ceases to be applicable.[283] Upon the same principle, viz. that the rule in Clayton's Case is founded on the presumed intention of the parties, it follows that it cannot be applied, as against a person who is a creditor, in respect of a fraud committed on him, and of which he is ignorant.[284]

Release.

A release of one partner from a partnership debt discharges all the others; for, where several persons are bound jointly, or jointly and severally, a release of one is a release of them all.[285] But in this respect a covenant not to sue differs from a release; for although, where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant.[286]

281 1 Lindl. Partn. 231.

282 Simson v. Ingham, 2 Barn. & C. 65; In re Hallett's Estate, 13 Ch. Div. 696.

283 Burns v. Pillsbury, 17 N. H. 66; Wickham v. Wickham, 2 Kay & J. 478; Taylor v. Kymer, 3 Barn. & Adol. 20.

284 Lindl. Partn. 236. And see Lacey v. Hill, 4 Ch. Div. 537.

285 U. S. v. Thompson, Gilp. 614, Case No. 16,487; Cocks v. Nash, 9 Bing. 341; Bower v. Swadlin, 1 Atk. 294; Ex parte Slater, 6 Ves. 146; Kiffin v. Willis, 4 Mod. 379; Lacy v. Kinaston, 1 Ld. Raym. 690. But see Greenwald v. Kaster, 86 Pa. St. 45.

286 Bates v. Bank (Tex. Civ. App.) 32 S. W. 339; Hutton v. Eyre, 6 Taunt. 289; Dean v. Newhall, 8 Term R. 168. An instrument of ambiguous import will be construed as a covenant not to sue, rather than as a release, whenever possible. Parmelee v. Lawrence, 44 Ill. 405; Greenwald v. Kaster, 86 Pa. St. 45; Burke v. Noble, 48 Pa. St. 168; Seymour v. Buller, 8 Iowa, 304; Grant v. Holmes, 75 Mo. 109; Shaw v. Pratt, 22 Pick. (Mass.) 305; De Zeng v. Bailey, 9 Wend. (N. Y.) 336. By statute in several of the states, when any partnership is dissolved, any partner may make a separate composition with one or all of

Novation.

A creditor who, after a partner has retired from a firm, treats the continuing partners as his debtors, does not, without more, discharge the retired partner.[287] Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that such should be the case, or unless the new security is of such a nature as to merge the original debt.[288] There is no difference, in such cases, between the liability of a retired partner at law or in equity.[289] The same rule applies to dormant partners who retire while the firm is indebted even more strongly than to others, for a creditor who has a security of which he is unaware cannot intentionally give up that security.[290] The introduction of a new partner has no effect on the liability of a retired partner, unless the liability of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. Even if the new firm adopts the old debt, and pays interest on it, this is prima facie only in pursuance of some agreement between the partners themselves; and a creditor who does no more than allow the partners to carry out that agreement does not debar himself of his right to look for payment to those originally indebted to him.[291] In some cases, as

the firm creditors; and such composition will be a full discharge to the debtors making it, and to them only, of all liabilities to the creditors with whom the same is made, incurred by reason of such partner's connection with the firm. Rhode Island: Gen. Laws, 1896, c. 156, §§ 1, 2, 5. New York: Code Civ. Proc. § 1942. New Jersey: Gen. St. 1895, p. 2338, § 10. Pennsylvania: Pepper & L. Dig. "Partnership," § 11. Ohio: Rev. St. 1890, § 3162. Michigan: How. Ann. St. § 7783. Kansas: Gen St. 1889, c. 75, § 1. Montana: Civ. Code, § 2082. South Carolina: Rev. St. 1893, § 2311.

287 Botsford v. Kleinhaus, 29 Mich. 332; Benson v. Hadfield, 4 Hare, 32, 37.

288 Walstrom v. Hopkins, 103 Pa. St. 118; Luddington v. Bell, 77 N. Y. 138; Bedford v. Deakin, 2 Barn. & Ald. 210.

289 Oakford v. Steam Shipping Co., 1 Hen. & M. 182.

290 Robinson v. Wilkinson, 3 Price, 538.

291 U. S. Nat. Bank v. Underwood, 2 App. Div. 342, 37 N. Y. Supp. 838; Day v. Wetherby, 29 Wis. 363; Griffee v. Griffee, 173 Pa. St. 434, 34 Atl. 44; Hopkins v. Carr, 31 Ind. 260; Hall v. Jones, 56 Ala. 493; Gulick v. Gulick, 16 N. J. Law, 186.

already seen, it is held that creditors can maintain an action against the new firm where it has agreed with the retiring partners to pay the debts of the old firm, especially when the new firm receives assets from the old firm.[292] But it by no means follows that a creditor who assents to an arrangement by which a new person becomes liable to him consents to abandon his hold on another person clearly liable to him already; and, unless a substitution of liability can be established, the old liability remains.[293] A retired partner may be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm.[294] An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration.[295] The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become liable to the creditor in respect of the debt in question. But this is not necessarily conclusive, for there may be circumstances showing that such was not the intention of the parties. At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner.[296]

The fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment.[297] And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the

292 See ante, p. 251.

293 Harris v. Farwell, 15 Beav. 31.

294 York v. Orton, 65 Wis. 6, 26 N. W. 166; Regester v. Dodge, 6 Fed. 6; Thompson v. Percival, 5 Barn. & Adol. 925; Evans v. Drummond, 4 Esp. 89.

295 Backus v. Fobes, 20 N. Y. 204; Collyer v. Moulton, 9 R. I. 90; Aetna Ins. Co. v. Peck, 28 Vt. 93; Thompson v. Percival, 5 Barn. & Adol. 925 (overruling Lodge v. Dicas, 3 Barn. & Ald. 611).

296 1 Lindl. Partn. 248.

297 Evans v. Drummond, 4 Esp. 89. And see 1 Bates, Partn. § 528; cf. Reed v White, 5 Esp. 122.

old firm.[298] A creditor may so conduct himself as to be estopped from saying that a retired partner is still liable to him. But it is not often that this can be established. A settlement by partners of their accounts, on the footing that one of them only is liable to a creditor, will not affect him, unless he has been guilty of some fraud, or has done some act or made some statement in order to induce the partners, or one of them, to settle their accounts on the faith that one of them is no longer liable.[299]

Where a continuing partner has assumed the debts of the old firm, the retiring partner occupies, as to him, the position of a surety. If the former fails to carry his agreement, and the retiring partner is compelled to pay, he has a right to be subrogated to all the rights of the creditor.[300] Some of the cases hold that the retiring partner is a surety as to creditors, also, when they know of the agreement for the payment of the debts by the continuing partner, and that an extension of time given the latter without the consent of the retiring partner discharges him.[301] Other cases, however, deny this effect to such an agreement unless the creditor assents.[302]

Merger.

When a creditor obtains from his debtor a security of a higher nature than he had before, and does not take care to accept it as a collateral security, the original debt is merged in the higher security, and can no longer be made the foundation of an action, or of proof in bankruptcy; and this doctrine is as much applicable to joint as to several obligations.[303] If a joint creditor obtains

298 Hart v. Alexander, 2 Mees. & W. 484; Wilson v. Lloyd, L. R. 16 Eq. 60; Brown v. Gordon, 16 Beav. 302.

299 Featherstone v. Hunt, 1 Barn. & C. 113; Davison v. Donaldson, 9 Q. B. Div. 623.

300 Scott's Appeal, 88 Pa. St. 173; Shamburg v. Abbott, 112 Pa. St. 6, 4 Atl. 518; Conwell v. McCowan, 81 Ill. 285; Chandler v. Higgins, 109 Ill. 602; Laylin v. Knox, 41 Mich. 40, 1 N. W. 913; Rodgers v. Maw, 15 Mees. & W. 444.

301 Gates v. Hughes, 44 Wis. 332; Palmer v. Purdy, 83 N. Y. 144; Savage v. Putnam, 32 N. Y. 501; Smith v. Shelden, 35 Mich. 42; Johnson v. Young, 20 W. Va. 614.

302 Whittier v. Gould, 8 Watts (Pa.) 485; Williams v. Boyd, 75 Ind. 286; Rawson v. Taylor, 30 Ohio St. 389. This is the English doctrine. 1 Bates, Partn. §§ 533, 534.

303 Woodworth v. Spaffords, 2 McLean, 168, Fed. Cas. No. 18,020; Mason v.

judgment against one of the partners only, he loses his remedy against the others even if not known to him.[304] But this rule does not apply when the other partners are beyond the jurisdiction of the court, and consequently no personal judgment can be obtained against them.[305] If one partner only is sued, and judgment is given for him, the creditor is not precluded from afterwards suing the others, unless the first action failed for a reason which applies equally to the second.[306] A judgment recovered against continuing partners and an incoming partner is a defense to an action against a retired partner who might have been sued with the continuing partners in the first instance.[307]

Liabilities which are joint and several are not merged by a judgment against one partner, whether the liability is ex contractu [308] or ex delicto.[309] The English rule as to liability ex delicto is contra.[310] Further, if several persons are jointly liable, and one of them afterwards gives a separate collateral security, on which judgment is recovered against him, this will not merge the prior joint liability.[311]

Same—Deceased Partners.

When a partner died, his liability on contracts survived at law to his co-partner, who alone could be sued in respect to them. Hence a judgment recovered against the surviving members of a firm does

Eldred, 6 Wall. 231; Smith v. Black, 9 Serg. & R. (Pa.) 142; Thompson v. Emmert, 15 Ill. 415; Ward v. Johnson, 13 Mass. 148; North v. Mudge, 13 Iowa, 496.

304 How v. Kane, 2 Pin. (Wis.) 531; Olmstead v. Webster, 8 N. Y. 413; Anderson v. Levan, 1 Watts & S. (Pa.) 334. But see Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416. The rule is otherwise by statute in some states. Mason v. Eldred, 6 Wall. 231.

305 Yoho v. McGovern, 42 Ohio St. 11; Ells v. Bone, 71 Ga. 466.

306 Phillips v. Ward, 2 Hurl. & C. 717.

307 Scarf v. Jardine, 7 App. Cas. 345.

308 Trafton v. U. S., 3 Story, 646, Fed. Cas. No. 14,135; Pierce v. Kearney, 5 Hill (N. Y.) 82; Gilman v. Foote, 22 Iowa, 560; Sherman v. Christy, 17 Iowa. 322. Cf. Ex parte Christie, Mont. & B. 352.

309 1 Jag. Torts, 341.

310 Id.; Brown v. Wootton, Cro. Jac. 73; Buckland v. Johnson, 15 C. B. 145; Brinsmead v. Harrison, L. R. 6 C. P. 584; Id., L. R. 7 C. P. 547.

311 Davis v. Anable, 2 Hill (N. Y.) 339; Drake v. Mitchell, 3 East, 251.

not preclude the judgment creditor from obtaining payment of the original debt from the estate of the deceased partner in equity;[312] nor does proof against his estate afford a defense to an action against the surviving partners.[313]

RIGHTS IN FIRM AND SEPARATE PROPERTY.

119. The rights of third persons in the property of the firm and of the individual partners will be considered under the following heads:

(a) Firm creditors in firm property (p. 274).
(b) Partners in firm property (p. 280).
(c) Separate creditors in firm property (p. 283).
(d) Separate creditors in separate property (p. 285).
(e) Firm creditors in separate property (p. 287).
(f) Partners in separate property (p. 293).
(g) Joint and separate creditors in firm and separate property (p. 296).

When one member of a firm dies or becomes insolvent, or the firm itself becomes insolvent, many questions arise as to the manner of distributing the property of the partnership and of the individual members. The discussion of these rules, which is to follow, is taken almost entirely from the principles which govern the distribution of the assets of bankrupt firms and their members; but the same principles apply to the administration of the estates of deceased partners.[314] The rights of the different kinds of creditors are worked out through the principle of a partner's lien already discussed.[315] The creditors themselves have no lien unless expressly created.[316]

312 Liverpool Borough Bank v. Walker, 4 De Gex & J. 24; Jacomb v. Harwood, 2 Ves. Sr. 265.

313 In re Hodgson, 31 Ch. Div. 177.

314 Gray v. Chiswell, 9 Ves. 118.

315 Ante, p. 179.

316 2 Bates, Partn. § 824; Waples-Platter Co. v. Mitchell (Tex. Civ. App.) 35 S. W. 200; Richards v. Leveille, 44 Neb. 38, 62 N. W. 304. A co-partnership does not hold its property in trust for its creditors, nor have its creditors a lien upon its property by reason of being such, so as to preclude it from preferring one of its creditors in good faith. Aetna Ins. Co. v. Bank of Wilcox (Neb.) 67 N. W.

SAME—FIRM CREDITORS IN FIRM PROPERTY.

120. Firm creditors are entitled to priority of payment out of the firm property, except

EXCEPTIONS—(a) Where there is a dormant partner, but no ostensible firm (p. 276).

(b) Where the obligation is a joint, but not a firm, obligation (p. 276).

(c) Where firm property has been converted in good faith into separate property (p. 277).

The joint creditors have the first claim for payment out of the joint estate;[317] and, until they have been paid all the principal moneys due to them, with interest thereon, if their debts carry interest, no other person is entitled to receive anything out of the

449; Richards v. Leveille, 44 Neb. 38, 62 N. W. 304. But see Steele v. Bank (Neb.) 66 N. W. 841.

[317] Hartman's Appeal, 107 Pa. St. 327; Black's Appeal, 44 Pa. St. 503; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Bush v. Clark, 127 Mass. 111; Preston v. Colby, 117 Ill. 477, 4 N. E. 375; Pahlman v. Graves, 26 Ill. 405; In re Lloyd, 22 Fed. 90; Murrill v. Neill, 8 How. 414; In re Childs, 9 Ch. App. 508. The rule that firm property shall be subject first to the payment of firm debts, in preference to individual debts, is enforceable only in equity. Coe v. Shoe Co., 61 Ill. App. 602. Where a cause of action for the breach of a contract made with a partnership accrues before the death of one of the partners, the damages recoverable therefor by the survivor should be listed as a firm asset. Richards v. Maynard, Id. 336. Where a partner, in his own name, sold partnership lands, with the consent of the other partner, and the proceeds of sales were credited on the books of the firm, it was proper for the court, in a suit to dissolve the partnership and settle its affairs, to determine that said lands were partnership assets, for the purpose of paying its debts, and therefore the heirs of the latter partner could not equitably claim any interest therein. Dunlap v. Byers (Mich.) 67 N. W. 1067. Under an assignment for the benefit of creditors, a note given for obligations of the firm should be allowed against the firm assets, though it was signed by the partners individually. Union Nat. Bank v. Dreyfus, 61 Ill. App. 323. An insolvent partnership, composed of three of the four members of another insolvent partnership, cannot as a creditor of the latter, share equally with its other creditors in the distribution of its assets. McCruden v. Jonas, 173 Pa. St. 507, 34 Atl. 224; Appeal of Greenboum, Id. Where one of the members of an insolvent firm sells out his interest, and a new firm is formed, which assumes the debt of the old firm, and continues the business with the same assets, and makes an assignment for benefit of cred-

assets of the firm. If a person is truly a creditor of the firm, he is not deprived of his right to rank as a joint creditor merely because he may have some separate security for his debt; for he is treated, in such a case, as a joint creditor, having the advantage of a collateral security.[318]

Nominal Partner—No Actual Firm.

Those who deal with persons representing themselves to creditors generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.[319]

itors, the creditors of the old and new firms may prove their claims pari passu, and be preferred over individual creditors of such new firm. But where one of the members of an insolvent firm sells out his interest under a promise that the firm debts shall be paid out of the firm assets, creditors of the old firm and a creditor of the new firm cannot prove pari passu with the individual creditors of a partner in the first firm, who did not continue in the new firm on an assignment by such partner. Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007; Davies v. Same, Id. Covenants of the partners with each other cannot affect firm creditors. Lord Craven v. Widdows, 2 Cas. Ch. 139. As respects the satisfaction of debts out of partnership property, the priority of partnership over individual creditors depending on no absolute right of the firm creditors, but being derived merely from the lien of each partner upon such property to have firm debts paid, rather than that resort should be had for that purpose to his private property, a single sale of the whole corpus of firm property may be made by the sheriff under executions in his hands issued upon separate judgments, recovered by different plaintiffs against the several different partners as individuals; and the purchaser is not postponed to the satisfaction of firm creditors in the enjoyment of his purchase, nor is the firm creditor in a position to complain. Doner v. Stauffer, 1 Pen. & W. (Pa.) 198.

318 In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750; Tucker v. Oxley, 5 Cranch, 34; Ex parte Clowes, 2 Brown, Ch. 595; Ex parte Hunter, 1 Atk. 223, 227.

319 Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007. A member of a partnership, created by holding out, cannot, on dissolution of the firm, prove a claim of his own against the firm assets, in competition with the firm creditors. Gibbs v. Humphrey, 91 Wis. 111, 64 N. W. 750. A creditor of an ostensible partnership cannot subject the property which is in the possession and use of the actual partners to the payment of his claim, in priority to creditors of the actual partners. Broadway Nat. Bank v. Wood, 165 Mass. 312, 43 N. E. 100.

Dormant Partner—No Ostensible Firm.

The prior right of a partnership creditor to be paid out of the common property in preference to a separate creditor of either of the partners does not exist in the case of a dormant partnership. In such case, a creditor whose debt relates to the business of the firm, and who is behind the creditors or vendees of the ostensible partner in his attachment, is not permitted to defeat them, and gain a priority, because he has discovered the concealed liability of a secret partner.[320] The true principle in these cases is that those funds shall be liable on which the credit is given. In an open firm, the credit is given to the firm, and to the goods they are possessed of, and a partnership creditor is first paid out of them; but, if the partner be unknown, the credit is given to the visible partner only, and the goods in his possession are supposed to be his own, and in such case the discovery of such latent partner cannot give any preference to a partnership creditor. As between the partners themselves, there is no reason to make any distinction in their rights, whether any are dormant or not; but, as to the public, it is not only highly proper, but necessary to prevent injustice towards creditors, that this difference should be observed.[321] The dormant partner has clearly no equity to require the application of the partnership property to the payment of the firm debts, to his exoneration, as against the creditors of the ostensible partner, who has been dealt with as the sole owner.[322] And the creditors of the firm, who have no equity, except such as can be worked out through the dormant partner, cannot require that the partnership property be first applied to the satisfaction of their debts.[323] It is a race of diligence between the two classes of creditors, and equity will not interfere to deprive either of a legal advantage.[324]

Joint but not Firm Debt.

This priority in the distribution of the partnership property is given to firm creditors only. The reason of the rule fails when a

320 French v. Chase, 6 Me. 166; Cammack v. Johnson, 2 N. J. Eq. 163.

321 Lord v. Baldwin, 6 Pick. (Mass.) 348.

322 Cammack v. Johnson, 2 N. J. Eq. 163.

323 French v. Chase, 6 Me. 166; Lord v. Baldwin, 6 Pick. (Mass.) 348.

324 Hillman v. Moore, 3 Tenn. Ch. 454; Whitworth v. Patterson, 6 Lea (Tenn.) 119.

debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract. Thus, if a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such.[325]

Conversion of Firm into Separate Property.

The rule that obtains in the distribution of the estate of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine, for the benefit and protection of the partners, respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment, out of firm assets, over the individual creditors, is always worked out through the lien of the partners.[326] Upon the death of one partner, or when the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they saw fit. Each has the right to waive his equitable lien, and together they may sell, assign, or mortgage the property of the firm to pay or secure either an individual debt of one of the partners or the debts of the firm.[327] Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors, by the execution, in the firm name or by authority of the partners, of a chattel mortgage upon the property of the firm, is not of itself such a fraud upon the partnership cred-

325 Forsyth v. Woods, 11 Wall. 484; Turner v. Jaycox, 40 N. Y. 470; Ex parte Weston, 12 Metc. (Mass.) 1. But see Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170; Hoare v. Bank Corp. 2 App. Cas. 589.

326 Warren v. Farmer, 100 Ind. 593, 597; Trentman v. Swartzell, 85 Ind. 443.

327 Case v. Beauregard, 99 U. S. 119; Baker's Appeal, 21 Pa. St. 76; Goembel v. Arnett, 100 Ill. 34; Hapgood v. Cornwell, 48 Ill. 64; Sage v. Chollar, 21 Barb. (N. Y.) 596; Dimon v. Hazard, 32 N. Y. 65; Sylvester v. Henrich (Iowa) 61 N. W. 942; Miller v. Gunderson (Neb.) 67 N. W. 769. But a preference of individual debts of a partner in an assignment by the firm is void. Schiele v. Healy, 10 Daly, 92; Vernon v. Upson, 60 Wis. 418, 19 N. W. 400; Willis v. Bremner, 60 Wis. 622, 19 N. W. 403.

itors as will authorize the setting aside of the chattel mortgage at the suit of a creditor.[328]

Where a sale or pledge of partnership property is fraudulent in fact, so as to invoke the jurisdiction of the court on behalf of the creditors to set it aside, the equitable rule of distribution will be applied.[329] Partners, the same as others, may, by a sale or mort-

[328] National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46; Kennedy v. Bank, 23 Hun (N. Y.) 494; In re Kahley, 2 Biss. 383, Fed. Cas. No. 7,593; Jones, Chat. Mortg. § 44. A dissolution and division of assets among partners is not in itself fraudulent, although the object is to prevent individual creditors of one partner from levying on partnership property. Atkins v. Saxton, 77 N. Y. 195. Money paid by one partner to his individual creditor in satisfaction of a just debt, and received by the creditor without knowledge that it was partnership money, could be retained by the creditor, as against the partnership or the other partners, though derived from the sale of partnership property. (Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327, reversed.) Babcock v. Standish, 53 N. J. Eq. 376, 33 Atl. 385. In the absence of fraud, an insolvent partnership may, for a fair consideration, transfer its entire property in payment of an individual debt of its members. Myers v. Tyson, 2 Kan. App. 464, 43 Pac. 91. A chattel mortgage given by a firm to secure certain of its creditors was not rendered void as to the creditors in general by reason of the fact that among the preferred claims was a note individually made by one of the partners, where the note represented money borrowed by such partner for the firm, and used in the partnership business, and was in fact not his individual indebtedness, but the debt of the firm. Steele v. Bank (Neb.) 66 N. W. 841. Where the wives of members of a mercantile firm buy goods of such firm, and credit their value on the individual notes of their husbands, given for bona fide debts due such wives, the transfer is not void as to the creditors of such firm, though it is insolvent. John V. Farwell Co. v. Stick (Iowa) 61 N. W. 565. A transaction whereby one member of a firm, without his partner's knowledge, paid a private debt out of the partnership assets, is prima facie fraudulent as to the firm. Brickett v. Downs, 163 Mass. 70, 39 N. E. 776. Where a firm does business on land, the title to which stands in one of the partners, a bona fide mortgagee for money lent to enable the owner to enter into the partnership has a lien on the property superior to that of the firm creditors. Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078; Lamport v. Miller, Id. A provision in a chattel mortgage executed by an insolvent partnership, that the trustee named in the mortgage should sell all the grantor's property, and pay, first, three creditors of the individual members of the firm, was void as to the firm creditors. Bannister v. Miller (N. J. Ch.) 32 Atl. 1066.

[329] Hardy v. Mitchell, 67 Ind. 485; James v. Vanzandt, 163 Pa. St. 171, 29 Atl. 879; Jackson Bank v. Durfey, 72 Miss. 971, 18 South. 456. If a dissolution is not made in good faith, but to divert partnership assets from partnership creditors to individual creditors, it is fraudulent, and partnership creditors are entitled to

gage of the partnership property, give a preference to their creditors. If a sale or mortgage is made in good faith, to secure a bona fide debt or debts, the transaction cannot be successfully assailed on the ground that the creditors preferred were the individual creditors of the several partners.[330] So one partner may sell his interest in the firm property to his co-partner, in consideration of the latter assuming the payment of the firm debts. The property which belonged to the firm thus becomes the individual property of the

priority out of the assets, In re Cook, 3 Biss. 122, Fed. Cas. No. 3,150; Collins v. Hood, 4 McLean, 186, Fed. Cas. No. 3,015; In re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2,270; In re Tomes, 19 N. B. R. 36, Fed. Cas. No. 14,084; even though the transfer was to pay individual debts, Tracy v. Walker, 1 Flip. 41, Fed. Cas. No. 14,129; Collins v. Hood, supra; Sanderson v. Stockdale, 11 Md. 563; Flack v. Charron, 29 Md. 311; Phelps v. McNeely, 66 Mo. 554; Ferson v. Monroe, 21 N. H. 462. In such case the insolvency of the partnership may be considered, in determining whether the dissolution was in good faith or not. Frank v. Peters, 9 Ind. 344; Shimer v. Huber, 19 N. B. R. 414, Fed. Cas. No. 12,787. On dissolution of the partnership, the firm creditors have the right to have partnership property applied to the payment of the partnership debts in preference to those of the individual partner. Case v. Beauregard, 99 U. S. 119; Evans v. Winston, 74 Ala. 349; Warren v. Taylor, 60 Ala. 218. And this right cannot be impaired by any consideration with reference to the amount of capital contributed by each individual partner. Wilson v. Robertson, 21 N. Y. 587. And debts contracted in the name of one partner may be shown to be in reality partnership debts. Cox v. Platt, 32 Barb. (N. Y.) 126; Read v. Baylies, 35 Mass. 497; Marks v. Hill, 15 Grat. (Va.) 400; Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430; Siegel v. Chidsey, 28 Pa. St. 279; Gwin v. Sedley, 5 Ohio St. 96; Haben v. Harshaw, 49 Wis. 379, 5 N. W. 872; Schaeffer v. Fithian, 17 Ind. 463; Wait v. Bank, 19 N. B. R. 500, Fed. Cas. No. 17,043. But, where such debt was incurred by consent or privity of the other partner, proof of joint creditors against the separate estate, in competition with the separate creditors, will not be admitted. In re Lloyd, 22 Fed. 91; In re McEwen, 12 N. B. R. 11, Fed. Cas. No. 8,783; In re McLean, 15 N. B. R. 333, Fed. Cas. No. 8,879; In re May, 19 N. B. R. 101, Fed. Cas. No. 9,328. A transfer of firm property to pay the separate debts of one partner is a voluntary conveyance; and, where the firm is insolvent, it is void. Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Burtus v. Tisdall, 4 Barb. (N. Y.) 571; Dart v. Bank, 27 Barb. (N. Y.) 337; Walsh v. Kelly, 42 Barb. (N. Y.) 98, 27 How. Prac. (N. Y.) 359; Elliot v. Stevens, 38 N. H. 311; Ferson v. Monroe, 21 N. H. 462; Wilson v. Robertson, 21 N. Y. 587; Hartley v. White, 94 Pa. St. 31. But see Schaeffer v. Fithian, supra; McDonald v. Beach, 2 Blackf. (Ind.) 55; Schmidlapp v. Currie, 55 Miss. 597; National Bank v. Sprague, 20 N. J. Eq. 13; Sigler v. Bank, 8 Ohio St. 511; Ex parte Lodge, 1 Ves. Jr. 166.

330 Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306.

continuing partner, and the firm creditors have no priority in such property unless the retiring partner retained his lien thereon. The validity of such transactions depends on the good faith of the parties,[331] and the fact that the firm is insolvent is not enough, alone, to show want of good faith, unless the insolvency was known to the partners at the time of the transfer. On all these points there is considerable conflict, at least in the dicta of the judges; but nearly all are in harmony with the principle that, if the bona fides of the transaction is impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity.[332] The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partnership assets, and impress a trust upon such assets for that purpose.[333]

SAME—PARTNERS IN FIRM PROPERTY.

121. A partner's rights in the partnership property are subordinate to the rights of firm creditors, except

EXCEPTIONS—(a) When his separate property has been fraudulently dealt with as the property of the firm (p. 282).

(b) When he carries on a distinct trade in respect to which the firm has become his debtor (p. 283).

(c) When he has been discharged, in bankruptcy or otherwise, from his firm liability, and has afterwards become a creditor of the firm (p. 283).

A partner in a bankrupt firm cannot prove in competition with the creditors of the firm. They are, in fact, his own creditors, and

[331] Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Howe v. Lawrence, 9 Cush. (Mass.) 553; Fulton v. Hughes, 63 Miss. 61; Allen v. Center Valley Co., 21 Conn. 130; Douglass v. Alder (Utah) 44 Pac. 706.

[332] Olson v. Morrison, 29 Mich. 395; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; Darby v. Gilligan, 33 W. Va. 246, 10 S. E. 400.

[333] Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007.

he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself.[334] If, therefore, a partner is a creditor of the firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate.[335] Again, as the estate of a deceased partner is liable for the debts of the firm, it follows that, so long as such liability exists, his executors cannot prove against the joint estate in the hands of the surviving partners for the amount due from them to his

[334] Campbell v. McGuire, 58 Ill. App. 37; Ex parte Rawson, Jac. 274, 279; Ex parte Sillitoe, 1 Glyn & J. 382; Ex parte Hargreaves, 1 Cox, Ch. 441; Ex parte Reeve, 9 Ves. 590. An agreement between partners to pay a retiring partner the capital contributed by him to the firm, if made in good faith, and without injury to the then creditors, does not create a fictitious claim against the firm. Baily v. Hornthal, 89 Hun, 514, 35 N. Y. Supp. 437. A firm whose members own equal undivided interests in its real estate may allow one member to retire and take his portion of the real estate as security for a debt due him from the firm. Childs v. Pellett, 102 Mich. 558, 61 N. W. 54. See, also, Spieker v. Lash, 102 Cal. 38, 36 Pac. 362. Where members of a firm mortgage the firm property to secure a creditor of another firm, of which they are sole members, such mortgage is a fraud on the creditors of the first-named firm, and the rights of the mortgagee are subordinate to those of such creditors. Bonwit v. Heyman, 43 Neb. 537, 61 N. W. 716. A firm creditor cannot set aside, as fraudulent, a voluntary conveyance by one of the partners of his individual lands to his wife, unless there are no firm assets, or an insufficiency thereof, and no individual creditors, or his individual property is more than sufficient to pay them in full, unless the firm creditor is also an individual creditor. Hull v. William Deering & Co., 80 Md. 424, 31 Atl. 416. A trust deed executed by a member of an insolvent firm, on his own property, to secure the individual debt of his partner, for which he was not bound, is fraudulent as to creditors of the firm, and will be set aside. Erb v. West (Miss.) 19 South. 829. Where the profits of a banking firm were divided, and credited to the personal account of each partner, an assignment by one of the partners of his share so credited as security for a personal debt is valid as against the firm creditors, where the firm was solvent at the time of the assignment. Bingham v. Tuttle, 82 Hun, 51, 31 N. Y. Supp. 68.

[335] Amsinck v. Bean, 22 Wall. 395; Houseal's Appeal, 45 Pa. St. 484; In re Rieser, 19 Hun (N. Y.) 202; Rodgers v. Meranda, 7 Ohio St. 179. Cf. Childs v. Pellett, 102 Mich. 558, 61 N. W. 54. Individual partners can claim no exemption from execution upon property once placed by them in the partnership stock, and so remaining. It is joint property, and the right of creditors accrues to have it applied to the payment of their debts, the partnership having become bankrupt. In re Corbett, 5 Sawy. 206, Fed. Cas. No. 3,220.

estate.[336] But, if those debts are paid, or the estate of the deceased is relieved from them, such proof is admissible,[337] except in respect of assets properly brought into or left in the business by the executors as part of the capital of the deceased. No proof, however, in respect of such assets is admissible against the joint estate of the surviving partners, until all their joint debts, contracted as well before as after the death of the deceased, are paid.[338]

Fraud.

If separate property of one partner has been fraudulently converted by his co-partners to the use of the firm, such property must be treated as the separate estate of the defrauded partner; and proof on his behalf (or rather on behalf of his separate estate) is therefore allowed, in respect of such property, against the joint estate, and in competition with the joint creditors.[339] Upon precisely the same principle, if a partner has fraudulently converted property of the firm to his own use, proof on behalf of the joint estate is allowed, in respect of such property, against his separate estate, and in competition with his separate creditors.[340]

Assets of a deceased partner, brought into the business by his executor in breach of trust, do not form part of the joint estate of the surviving partners, and may be the subject of proof against that estate, not only in competition with those creditors who have become such since the death of the deceased, but also in competition with those whose debts accrued in his lifetime.[341] As regards the last, the proof is exceptional, but is allowed for the same reason as similar proof is allowed where separate estate of one partner has been fraudulently dealt with as property of the firm.[342]

336 Nanson v. Gordon, 1 App. Cas. 195; Ex parte Blythe, 16 Ch. Div. 620.

337 Ex parte Edmonds, 4 De Gex, F. & J. 488; Ex parte Andrews, 25 Ch. Div. 505.

338 Ex parte Butterfield, De Gex, 570; Ex parte Garland, 10 Ves. 110; Ex parte Corbridge, 4 Ch. Div. 246.

339 Rodgers v. Meranda, 7 Ohio St. 179, 194; Ex parte Harris, 1 Rose, 437; Ex parte Sillitoe, 1 Glyn. & J. 382.

340 Ex parte Lodge, 1 Ves. Jr. 166.

341 Ex parte Westcott, 9 Ch. App. 626; Ex parte Garland, 10 Ves. 110.

342 Supra, note 339.

Same—Distinct Trades.

If one of two firms, carrying on distinct trades, becomes creditor of the other in the ordinary way of their trade, the creditor firm may prove against the joint estate of the debtor firm, in competition with its other joint creditors, although one or more persons may be partners in both firms.[343] If neither firm contains the other, e. g. if one firm is A. and B., and the other firm is A. and C., either may rank as a joint creditor of the other, because the creditors of the one are not creditors of the other.[344] The exception now under discussion is, however, only allowed provided two things concur, viz.: First, there must be two distinct trades; and, secondly, the debt sought to be proved must have arisen from dealings between trade and trade in the ordinary way of business.[345]

Same—Discharge.

When a partner has obtained his order of discharge in bankruptcy, or has been otherwise discharged from the joint debts, he is no longer a debtor to the creditors of the firm, and does not, therefore, fall within the rule which precludes a person from competing with his own creditors.[346]

SAME—SEPARATE CREDITORS IN FIRM PROPERTY.

122. Separate creditors have no rights in firm property until the firm creditors have been paid and the liens of the other partners discharged.

The lien which each partner has upon the assets of the firm must be satisfied before any part of the joint estate can be divided among the members of the firm, or, which comes to the same thing, be carried to the account of their respective separate estates. Therefore, after the joint debts of the firm have been paid, with inter-

343 Houseal's Appeal, 45 Pa. St. 484; In re Lane, 2 Low. 333, Fed. Cas. No. 8,044; In re Buckhause, 2 Low. 331, Fed. Cas. No. 2,086; Ex parte St. Barbe, 11 Ves. 413. Contra, Somerset Potters Works v. Minot, 10 Cush. (Mass.) 592.

344 Ex parte Thompson, 3 Deac. & C. 612.

345 Ex parte Williams, 3 Mont., D. & D. 433; Ex parte Hargreaves, 1 Cox, Ch. 440; Ex parte Sillitoe, 1 Glyn. & J. 374, 382.

346 Ex parte Smith, 14 Q. B. Div. 394; Ex parte Atkins, Buck, 479; 2 Bates, Partn. § 837.

est to the date of the receiving order,[347] the surplus of the joint estate must next be applied in satisfaction of the liens of the individual partners upon it;[348] and it is the ultimate surplus only which is to be divided among the partners, or their respective separate estates, in proportion to their respective shares in the assets of the firm. It is hardly necessary to observe that a lien existing in favor of one partner increases his separate estate, and confers upon his separate creditors a right to prove against the joint estate in preference to the separate creditors of the other partners, who have no such lien.[349] If the joint estate is not sufficient to satisfy the lien, the deficiency becomes provable against the separate estates of the indebted partners.[350] The joint debts being paid, and the liens of the individual partners on the partnership assets being satisfied, the surplus of the joint estate becomes divisible among the respective separate estates of the partners in proportion to their respective shares in the partnership property. The surplus of the joint estate, having been thus distributed, loses its character of joint estate, and becomes, to all intents and purposes, separate estate of the partners to whose credit it is carried. If any joint estate is carried to a separate estate before the joint debts are paid and the partners' liens are satisfied, such joint estate will be ordered to be restored.[351]

[347] Ex parte Findlay, 17 Ch. Div. 334.

[348] Ex parte King, 17 Ves. 115; Ex parte Reid, 2 Rose, 84; Ex parte Reeve, 9 Ves. 588; Ex parte Terrell, Buck, 345; Fereday v. Wightwick, Tam. 250; Holderness v. Shackels, 8 Barn. & C. 612.

[349] Ex parte Reid, 2 Rose, 84; Ex parte King, 17 Ves. 115.

[350] Ex parte Watson, Buck, 449; Ex parte Terrell, Id. 345; Ex parte King, 17 Ves. 115.

[351] Allen v. Wells, 22 Pick. (Mass.) 450; Fern v. Cushing, 4 Cush. (Mass.) 357; Ex parte Lanfear, 1 Rose, 442.

SAME—SEPARATE CREDITORS IN SEPARATE PROPERTY.

123. Separate creditors of a partner are entitled to priority of payment out of the separate property of that partner.

The rule as above stated is supported by the great weight of authority,[352] though there are some contra cases.[353] The history of the rule, and the reasons for and against it, are reviewed in Rodgers v. Meranda.[354] In that case Bartley, C. J., says: "And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts, and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given,—that in contracts with a partnership credit is

352 In re Dunkerson, 4 Biss. 277, Fed. Cas. No. 4,158; In re Estes, 3 Fed. 134; Union Nat. Bank of Chicago v. Bank of Commerce of St. Louis, 94 Ill. 271; McIntire v. Yates, 104 Ill. 491; Miller v. Clarke, 37 Iowa, 325; Trustees of Catskill Bank v. Hooper, 5 Gray (Mass.) 574; Bush v. Clark, 127 Mass. 111; Nutting v. Ashcroft, 101 Mass. 300; Meech v. Allen, 17 N. Y. 300; Heckman v. Messinger, 49 Pa. St. 465; Lord v. Devendorf, 54 Wis. 491, 11 N. W. 903; Ex parte Cook, 2 P. Wms. 500.

353 Camp v. Grant, 21 Conn. 41; Pearce v. Cooke, 13 R. I. 184; White v. Dougherty, Mart. & Y. (Tenn.) 309; Bardwell v. Perry, 19 Vt. 292; Ex parte Hodgson, 2 Brown, Ch. 5. For a peculiar rule in Kentucky, see Fayette Nat. Bank of Lexington v. Kenney's Assignee, 79 Ky. 133; Northern Bank of Kentucky v. Keizer, 2 Duv. (Ky.) 169.

354 7 Ohio St. 179, 181.

given on the supposed responsibility of the firm, while in contracts with a partner as an individual reliance is supposed to be placed on his separate responsibility;[355] and, again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner, and that there is, consequently, a clear equity in confining the creditors, as to preferences, to each estate, respectively, which has been thus benefited by their transactions.[356] But these reasons are not entirely satisfactory. * * * For, leaving the rule to stand which gives the preference to the joint creditors in the partnership property, perfect equality between the joint and individual creditors is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purposes of justice, became necessary as a correlative rule." [357]

[355] 3 Kent, Comm. 65.

[356] M'Culloh v. Dashiell's Adm'r, 1 Har. & G. (Md.) 96.

[357] "The theories which have been suggested to account for the course of distribution in equity do not go to the source of the change, and explain the cause which brought about the departure from the common-law system. The notion of credit, that, as the joint creditors relied upon firm assets, the separate creditors looked to the separate estates for payment, is an assumption. It contradicts the experience which imputes to every man a knowledge of the law. The credit will depend upon the estate which the debtor had. The partners have joint and separate estates, which are both subject to firm debts. The credit would, of course, be given in reliance upon both estates. The partner has a resulting interest in the firm after all its debts are paid, and his separate estate, which is also subject to the firm debts. His creditor could expect nothing from the partner's share until the firm creditors had been satisfied, and he could only share the separate estate with them unless insolvency supervened, which would give him a paramount title to the separate fund. The credit given to a debtor is not the cause of his estate, but a consequence of his possessing the means to pay the debt." J. Pars. Partn. 191.

Applying Separate Property to Firm Debts.

"Any attempt, by sale or otherwise, with notice, to divert the separate property or funds of the individual debtor from the payment of his separate debts to the discharge of a partnership liability of the firm of which he may be a member, is, in principle, a fraud on the rights of a creditor of the individual debtor, and void as to him." [358] There are, however, cases which deny this to be the rule. The same conflict exists here as in the case, already considered, of the conversion of firm into separate property.[359]

SAME—FIRM CREDITORS IN SEPARATE PROPERTY.

124. The rights of firm creditors in the separate property of the partners are subordinate to the rights of separate creditors, except

EXCEPTIONS—(a) Where there is no joint estate, or living solvent partner (p. 288).

(b) Where the property of the firm has been fraudulently converted (p. 289).

(c) Where the partner has become indebted to the firm in respect to a separate trade carried on by him (p. 290).

(d) In England, where a firm creditor is himself the petitioner (p. 291).

(e) Where the government is a firm creditor (p. 292).

(f) Where the firm creditor has acquired a legal priority in the separate property (p. 292).

As seen in the last section, partnership creditors are postponed to the individual creditors of the partners in the distribution of the individual property of the partners. After payment of the separate

[358] Holton v. Holton, 40 N. H. 77, Ames, Cas. Partn. p. 332; Jarvis v. Brooks, 3 Fost. (N. H.) 136; Crockett v. Crain, 33 N. H. 542; Ferson v. Monroe, 1 Fost. (N. H.) 462; Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458; Tappan v. Blaisdell, 5 N. H. 190; Morrison v. Blodgett, 8 N. H. 238, 248.

[359] Newman v. Bagley, 16 Pick. (Mass.) 570; McIntire v. Yates, 104 Ill. 491; O'Neil v. Salmon, 25 How. Prac. (N. Y.) 246, 252; Haynes v. Brooks, 17 Abb.

creditors of each partner,[360] the surplus of his estate is carried to the credit of the joint estate;[361] and, if the partner is a member of several bankrupt firms, the surplus of his separate estate must be divided among their respective joint estates, in proportion to the amount of debts proved against them, respectively.[362]

Exceptions—No Joint Estate, etc.

If, in the case of a bankrupt firm, there is no joint estate, the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners.[363] So, if one partner only is bankrupt, the creditors of the firm are entitled to rank as separate creditors against the separate estate of the bankrupt, if there is no joint estate,[364] and if there is no solvent ostensible part-

N. C. (N. Y.) 152, 160; Crooker v. Crooker, 52 Me. 267; Garsden v. Carson, 9 Rich. Eq. (S. C.) 252; Straus v. Kerngood, 21 Grat. (Va.) 584, 587. And see Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923.

360 Amsinck v. Bean, 22 Wall. 395, 401; In re Hamilton, 1 Fed. 800, 810; Cowan v. Gill, 11 Lea (Tenn.) 674. That separate creditors are not entitled to interest until joint creditors are paid, see Ex parte Clarke, 4 Ves. 677; Thomas v. Minot, 10 Gray (Mass.) 263; In re Berrian, 6 Ben. 297, Fed. Cas. No. 1,351.

361 Ex parte Wood, 2 Mont., D. & D. 283. Firm creditors are permitted to prove their claims against the separate estate for the purpose of keeping accounts, but not to receive a dividend until the separate creditors are paid. Ex parte Clay, 6 Ves. 813; Dutton v. Morrison, 17 Ves. 193.

362 Ex parte Franklyn, Buck, 332.

363 In re Jewett, 1 N. B. R. 491, Fed. Cas. No. 7,304; In re Downing, 3 N. B. R. 748, Fed. Cas. No. 4,044; In re Knight, 2 Biss. 518, Fed. Cas. No. 7,880; In re McEwen, 6 Biss. 294, Fed. Cas. No. 8,783; In re Litchfield, 5 Fed. 47; In re Blumer, 12 Fed. 489; Pahlman v. Graves, 26 Ill. 405; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328; D'Invilliers' Estate, 13 Phila. (Pa.) 362; Brock v. Bateman, 25 Ohio St. 609; Ex parte Hill, 2 Bos. & P. (N. R.) 191, note a; Ex parte Hayden, 1 Brown, Ch. 454; Ex parte Peake, 2 Rose, 54. But see, contra, Somerset Potters Works v. Minot, 10 Cush. (Mass.) 592; Howe v. Lawrence, 9 Cush. (Mass.) 553; Murrill v. Neill, 8 How. 414, 427; Weyer v. Thornburgh, 15 Ind. 124. Where one partner takes the firm assets, and agrees to pay the firm debts, the partnership creditors may prove against his estate, and share pari passu with the separate creditors, In re Lloyd, 22 Fed. 90. see Smith v. Spencer, 73 Ala. 299; as a separate creditor cannot be injured by a transfer of one partner's interest in the partnership property to his co-partner, in consideration of the grantee's assuming the liability of the firm, Griffin v. Cranston, 10 Bosw. (N. Y.) 1, 1 Bosw. (N. Y.) 281.

364 Ex parte Hayden, 1 Brown, Ch. 45; Ex parte Sadler, 15 Ves. 52; Ex parte Bradshaw, 1 Glyn & J. 99.

ner,[365] or, at all events, none in the country.[366] The fact that the estate of a deceased partner is solvent does not deprive the joint creditor of his right against the separate estate of the bankrupt.[367] If there is any joint estate, however small, the joint creditors will not be permitted to rank pari passu with separate creditors against the separate estate.[368] But where one partner only is bankrupt, nothing can be treated as joint estate by reason only of the doctrines of reputed ownership;[369] and joint property which is pledged for more than its value, or which, for any other reason, cannot to any extent be made available for the benefit of the creditors of the firm, is treated, with reference to the rule in question, as having no existence.[370] When one partner is dead, the joint creditors must proceed against the survivor, unless he is insolvent.[371] The rule in England is otherwise, and firm creditors may proceed in equity against the estate of the deceased partner even when there are sufficient firm assets in the hands of the survivor.[372]

Same—Fraud.

It has already been seen that, if a partner's separate property has been fraudulently converted by his co-partners to the use of the firm, which becomes bankrupt, the property so converted cannot be treated as part of the joint estate, but must be placed to the separate

365 Kensington v. Taylor, 14 Ves. 447. But cf. Ex parte Janson, 3 Madd. 229.

366 Ex parte Pinkerton, 6 Ves. 814, note.

367 Kendall v. Hamilton, 4 App. Cas. 504.

368 In re Slocum, Fed. Cas. No. 12,951; In re McEwen, 6 Biss. 294, Fed. Cas. No. 8,783; Brock v. Bateman, 25 Ohio St. 609; Harris v. Peabody, 73 Me. 262; Lodge v. Prichard, 1 De Gex, J. & S. 610. See, for a hard case, In re Marwick, 2 Ware, 229, Fed. Cas. No. 9,181.

369 See Ex parte Taylor, 2 Mont., D. & D. 753.

370 Ex parte Hill, 2 Bos. & P. (N. R.) 191, note; Ex parte Peake, 2 Rose, 54. If the joint property will all be consumed in costs, the joint creditors can share in the separate estate. In re McEwen, 6 Biss. 294, Fed. Cas. No. 8,783. Contra, Ex parte Kennedy, 2 De Gex, M. & G. 228.

371 Voorhis v. Childs' Ex'r, 17 N. Y. 354; Grant v. Shurter, 1 Wend. (N. Y.) 148; Lawrence v. Trustees, 2 Denio (N. Y.) 577; Caldwell v. Stileman, 1 Rawle (Pa.) 212; Van Reimsdyk v. Kane, 1 Gall. 371, 385, Fed. Cas. No. 16,871.

372 Wilkinson v. Henderson, 1 Mylne & K. 582. Cf. Wilmer v. Currey, 2 De Gex & S. 347; Beresford v. Browning, 1 Ch. Div. 30.

account of the defrauded partner.[373] Upon the same principle, if a partner has fraudulently converted to his own use property which in truth belongs to the firm, such property cannot be treated as part of his separate estate, but forms part of the joint estate of the firm. Hence, as, in the former case, proof on behalf of the separate estate is admitted against the joint estate, so, in the latter case, if the firm is bankrupt, proof on behalf of the joint estate is admitted against the separate estate,[374] although that estate may not, in the result, be greater by reason of the fraud.[375] Moreover, if the firm is not bankrupt, proof on behalf of the solvent partners is admitted against the estate of their bankrupt co-partner; and in this case the solvent partners rank as separate creditors, although the property fraudulently appropriated by the bankrupt belonged not to them exclusively, but to them jointly with himself.[376]

Whether, in any particular instance, there has been a fraudulent misappropriation of the partnership property, or not, must, of course, be determined by the facts of each case. It may, however, be observed that the mere circumstance that one partner is indebted to the firm is no proof of fraud; and, even if he has acted in violation of the articles of partnership, it may be found that those articles have by common consent been habitually ignored. To bring a case within the exception now under consideration, the individual partner must in effect have stolen the property of the firm, and his breach of good faith must not have been acquiesced in or condoned by his co-partners.[377] Any arrangement by which a debt arising from fraud is made a matter of mere partnership account precludes the firm from ranking, in respect of that debt, as a separate creditor against the separate estate of the individual partner.[378]

Same—Distinct Trades.

The same principle which, in the event of the bankruptcy of a firm, allows proof to be made on behalf of one of its members against

[373] Ante, p. 282.

[374] Ex parte Smith, 1 Glyn & J. 74; Ex parte Watkins, Mont. & M. 57; Ex parte Lodge, 1 Ves. Jr. 166.

[375] Read v. Bailey, 3 App. Cas. 94, affirming Lacey v. Hill, 4 Ch. Div. 537.

[376] Ex parte Yonge, 3 Ves. & B. 31, 2 Rose, 40.

[377] Ex parte Turner, 4 Deac. & C. 169; Ex parte Crofts, 2 Deac. 102; Ex parte Hinds, 3 De Gex & S. 613.

[378] Ex parte Turner, 4 Deac. & C. 169.

its joint estate, in respect of a debt contracted by the firm to him as a distinct trader,[379] also allows proof to be made on behalf of the joint estate of a firm against the separate estate of one of its partners, who has carried on a trade distinct from that of the firm, and has become indebted to it in the ordinary course of his distinct trading. If, therefore, a person who is a partner in a trading firm carries on a distinct trade of his own, and becomes indebted to the firm for goods sold to him in the way of their trades, and then becomes bankrupt, the firm is treated as a separate creditor for the debt so contracted, and is allowed to prove accordingly.[380] So, in the case of a bankrupt firm, proof for debts thus contracted by an individual partner is allowed, as between the joint estate of the firm and the separate estate of that partner, in competition with his separate creditors.[381] As Lord Eldon put it in Ex parte St. Barbe,[382] "a joint trade may prove against a separate trade, but not a partner against a partner." But, although there may have been distinct trades, still, if the debt in question has not been contracted in the ordinary course of carrying them on, such proof will not be allowed.[383]

Same—Firm Creditor Petitioning.

The court of chancery in England permits a petitioning creditor, though a joint creditor, to charge the separate effects pari passu with the separate creditors, because, as it is said, his petition, being prior in time, is in the nature of an execution in behalf of himself and the separate creditors.[384] This exception applies only to the petitioning creditor. The other firm creditors are not let in to share in the separate estate.[385] This exception does not appear to have been recognized by the courts of this country.[386]

379 Ante, p. 280.

380 Ex parte Hesham, 1 Rose, 146; Ex parte Castill, 2 Glyn & J. 124.

381 Ex parte St. Barbe, 11 Ves. 413.

382 11 Ves. 413.

383 Ex parte Williams, 3 Mont., D. & D. 433; Ex parte Sillitoe, 1 Glyn & J. 382; Ex parte Hargreaves, 1 Cox, Ch. 440.

384 Ex parte Ackerman, 14 Ves. 604; Ex parte Hall, 9 Ves. 349; Ex parte Detastel, 17 Ves. 247; Ex parte Burnett, 2 Mont., D. & D. 357. But see Murrill v. Neill, 8 How. 414; Ex parte Abell, 4 Ves. 837.

385 Ex parte Elton, 3 Ves. Jr. 238. Cf. Crispe v. Perritt, 1 Cooke, Bankr. Laws (8th Ed.) 26, 1 Atk. 133.

386 Murrill v. Neill, 8 How. 414.

Same—Government a Firm Creditor.

Under the federal bankrupt acts of March 3, 1797, and March 2, 1867, now repealed, the United States was given a priority in the payment of its claims against the property of insolvents. This priority extended to the separate property of partners, where the firm was indebted to the United States.[387] Where the debt was due from one partner, the United States had no priority in the firm assets, except for the partner's share after the firm debts were paid.[388]

Same—Legal Priorities Previously Acquired.

This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is, "Equitas sequitur legem." [389] As there is no doubt that, at law, the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner, the principle that the separate property of an individual partner is to be first applied to the payment of his separate debts has never been held to give priority, as to such property, to a subsequent judgment for an individual over a prior judgment for a partnership debt.[390] It is true that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character.[391] The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a

[387] Lewis v. U. S., 92 U. S. 618; U. S. v. Shelton, 1 Brock. 517, Fed. Cas. No. 16,272.

[388] U. S. v. Hack, 8 Pet. 271; U. S. v. Duncan, 4 McLean, 607, Fed. Cas. No. 15,003. And see Rex v. Sanderson, Wightw. 50.

[389] 1 Story, Eq. Jur. § 553; Meech v. Allen, 17 N. Y. 300, Ames, Cas. Partn. 326; In re Plummer, 1 Phil. Ch. 56; Preston v. Colby, 117 Ill. 477, 4 N. E. 375; Allen v. Wells, 22 Pick. (Mass.) 450; Howell v. Teel, 29 N. J. Eq. 490; Gillaspy v. Peck, 46 Iowa, 461; Cumming's Appeal, 25 Pa. St. 268.

[390] In re Lewis, 2 Hughes, 320, Fed. Cas. No. 8,313; In re Sandusky, 17 N. B. R. 452, Fed. Cas. No. 12,308; Adams v. Sturges, 55 Ill. 468; Estate of Frow, 73 Pa. St. 459; Wilder v. Keeler, 3 Paige (N. Y.) 167.

[391] White v. Carpenter, 2 Paige (N. Y.) 217.

lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt.[392] It is well settled that, in a suit against two or more co-partners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner.[393] The supreme court of New Hampshire has in several cases held otherwise.[394]

Marshaling.

When a firm creditor thus has two funds to which he can resort, the separate creditors can call into operation the doctrine of marshaling; and, if such partnership creditor can get satisfaction of any part of his claim out of the partnership assets, the pro rata distribution to which such partnership creditor is entitled out of the partnership fund shall be first applied as a credit on his claim against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditors of the latter.[395]

SAME—PARTNERS IN SEPARATE PROPERTY.

125. Partners are postponed to separate and firm creditors in the distribution of the separate property of co-partners, except

EXCEPTIONS—(a) Where there has been a fraudulent conversion (p. 294).

(b) Where there have been distinct trades (p. 294).

(c) Where the partnership had not been actually formed (p. 294).

(d) Where there are no joint debts (p. 295).

(e) Where the separate estate is insolvent (p. 296).

The principle that a debtor shall not be allowed to compete with his own creditors is as strictly carried out in administering the sep-

[392] Meech v. Allen, 17 N. Y. 300.

[393] Allen v. Wells, 22 Pick. (Mass.) 450; Newman v. Bagley, 16 Pick. (Mass.) 570; Stevens v. Perry, 113 Mass. 380.

[394] Jarvis v. Brooks, 23 N. H. 136; Bowker v. Smith, 48 N. H. 111.

[395] In re Lewis, 2 Hughes, 320, Fed. Cas. No. 8,313.

arate estates of individual partners as in administering the joint estate of a firm. The separate estate of each partner is liable to the debts of the firm, subject only to the prior claims of his separate creditors. Whence it is obvious that one partner cannot compete with the separate creditors of his co-partner without diminishing the fund which, subject to their claims, is applicable to the payment of the joint debts, and therefore of his own creditors. In other words, the rights of the joint creditors preclude one partner from ranking as a separate creditor of his co-partner until the joint creditors are paid in full.[396] Moreover, it is now settled, in opposition to some older cases,[397] that a solvent partner is not entitled to rank as a creditor against the estate of his bankrupt co-partner upon indemnifying that estate against the claims of the joint creditors. He must show that those claims are discharged or otherwise barred.[398] Although a partner cannot prove against his co-partner so long as the joint debts are unpaid,[399] yet, if a debt owing by the bankrupt partner to his co-partner has been canceled, and in consideration thereof the bankrupt has taken upon himself a debt due from his co-partner to a third party, this debt, so substituted for the first, may be proved by such third party, in competition with the other separate creditors of the bankrupt, whether the joint creditors are paid or not.[400] The disability of a partner to prove in competition with his own creditors prevents proof by a firm to which he belongs against his own separate estate, for proof by such a firm is obviously nothing more than proof by himself and co-partners.[401]

Exceptions—Fraud—Distinct Trades—Inchoate Partnerships.

The principle which allows joint estate to prove against separate estate, and separate estate to prove against joint estate, in cases where there has been a fraudulent conversion of property, or where

396 Amsinck v. Bean, 22 Wall. 395; Hill v. Beach, 12 N. J. Eq. 31; Ex parte Bass, 36 Law J. Bankr. 39; Ex parte Collinge, 4 De Gex, J. & S. 533; Nanson v. Gordon, 1 App. Cas. 195; Ex parte Carter, 2 Glyn & J. 233; Ex parte May, 3 Deac. 382.

397 Ex parte Taylor, 2 Rose, 175; Ex parte Ogilvy, Id. 177.

398 Ex parte Moore, 2 Glyn & J. 166.

399 Payne v. Matthews, 6 Paige (N. Y.) 19; Price v. Cavins, 50 Ind. 122; Alleman v. Reagan's Adm'r, 28 Ind. 109; Hill v. Beach, 12 N. J. Eq. 31.

400 In re Todd, De Gex, 87.

401 Ex parte Turner, 4 Deac. & C. 169; Ex parte Smith, 1 Glyn & J. 74.

there have been distinct trades, and a debt contracted in the course of those trades, is also applicable to proofs by one partner against another, in similar cases.[402] Moreover, if A., intending to become a partner with B., advances him money as his (A.'s) share of the common stock, and, before the partnership is entered into, B. becomes bankrupt, A. may prove against B.'s separate estate, as a separate creditor, for the amount of the advance, unless A., without being a partner, has made himself liable to creditors as if he were one.[403]

Same—No Joint Debts.

Hitherto the right of one partner to rank as a separate creditor of his co-partner has been considered solely with reference to joint creditors. It is necessary, however, also, to notice it with reference to separate creditors. They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his co-partner, but it is not for their sake that such rule has been established; and where the reason for the rule ceases to exist, the rule itself ceases to be applicable. Hence, if there never were any joint debts, or if all those which once existed have ceased to exist,[404] either because they have been paid, barred, satisfied, or converted into separate debts, then one partner, who is a creditor of another, may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors.[405] Again, if one partner has paid the joint debts, he is entitled to prove as a separate creditor of his co-partner for the amount of the share which ought to have been paid by him; and it is immaterial whether the debts have been paid before or since the bankruptcy.[406]

In cases of this sort, moreover, the amount provable against each bankrupt is ascertained, not by dividing the whole amount of the debts paid by the number of partners, or by the number of shares held by them without reference to their ability to pay, but by treat-

402 Ex parte Westcall, 9 Ch. App. 626; Ex parte Maude, 2 Ch. App. 550.

403 Ex parte Turquand, 2 Mont., D. & D. 339. See, also, Ex parte Megarey, De Gex, 167.

404 Ex parte Andrews, 25 Ch. Div. 505.

405 Ex parte Grazebrook, 2 Deac. & C. 186; Ex parte Young, 2 Rose, 40.

406 Scott's Appeal, 88 Pa. St. 173; Busby's Adm'x v. Chenault, 13 B. Mon. (Ky.) 554; Amsinck v. Bean, 22 Wall. 395; In re Dell, 5 Sawy. 344, Fed. Cas. No. 3,774; Hill v. Beach, 12 N. J. Eq. 31.

ing each partner as liable to contribute his own share, calculated as above, and also to contribute, as surety for the rest, to the payment of what is due from them, but which they are themselves unable to pay. Those, in fact, who can pay, must make up for those who cannot.[407] Again, although, where one partner is indebted to the firm, and the lien upon his share is insufficient to satisfy such debt, the deficiency cannot be proved against his separate estate in competition with the joint creditors of the firm, or until they are paid,[408] yet such deficiency is provable against his separate estate in competition with his separate creditors, where the rights of the joint creditors do not intervene.[409]

Same—Separate Estate Insolvent.

Further, if the separate estate of a partner is clearly insufficient to pay his separate debts, excluding that which he owes to his copartner, the latter is entitled to prove; for, ex hypothesi, there is no possibility of any surplus out of which the joint creditors can be paid anything whatever. They, therefore, are in no way prejudiced by the proof.[410]

SAME—JOINT AND SEPARATE CREDITORS IN FIRM AND SEPARATE PROPERTY.

126. Joint and separate creditors of a firm and of some or all its members may prove against both the firm and separate property. The English rule is, with some exceptions, contra.

With a view to avoid as much as possible any interruption in the statement of the principles according to which the conflicting rights of the creditors of the firm and the separate creditors of the individual partners are adjusted, the consideration of the position of those creditors who are both joint and separate (i. e. of those who, in respect of the same debt, have the option of suing either all the partners jointly or some or one of them separately from the others)

407 Wood v. Dodgson, 2 Maule & S. 195.

408 Ex parte Carter, 2 Glyn & J. 233; Ex parte Reeve, 9 Ves. 588.

409 Ex parte Watson, Buck, 449; Ex parte King, 17 Ves. 115.

410 Ex parte Topping, 4 De Gex, J. & S. 551; Ex parte Sheen, 6 Ch. Div. 235.

has been hitherto postponed. In order that a creditor may rank as a joint and separate creditor, it is necessary that there should be two distinct rights vested in him at the same time, by virtue of which he is enabled to pursue either of the two remedies above alluded to. In the United States firm and separate creditors are entitled to a dividend from the joint estate of the firm and the separate estates of the partners.[411]

English Rule Contra.

In England, such double proof is excluded. A joint and separate creditor is compelled to elect whether he will proceed against the firm property or the separate property.[412] The English bankruptcy act of 1883 establishes an exception, however, in cases of distinct trades or distinct contracts,[413] and a secured creditor is allowed to split his demand. Thus, he may prove for his whole debt against the estate to which the security does not belong, and retain and make what he can of his security; or he may give up his security, prove for the whole debt due on it (i. e. the whole secured debt) against the estate to which the security belongs, and then prove for the residue of his debt against the other estate,—thus in fact splitting his demand, and proving for part against the joint estate, and for the residue against the separate estates of the partners, or vice versa.[414]

411 In re Farnum, 6 Law Rep. 21, Fed. Cas. No. 4,674; Mead v. Bank, 6 Blatchf. 180, Fed. Cas. No. 9,366; In re Bigelow, 3 Ben. 146, Fed. Cas. No. 1,397; In re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772; Emery v. Bank, 3 Cliff. 507, Fed. Cas. No. 4,446; In re Long, 7 Ben. 141, Fed. Cas. No 8,476; In re Thomas, 8 Biss. 139, Fed. Cas. No. 13,886; Ex parte Nason, 70 Me. 367; Roger Williams Nat. Bank v. Hall, 160 Mass. 171, 35 N. E. 666; In re Vetterlein, 20 Fed. 110. Where an assignment for the benefit of creditors has been made by a firm, and also by the partners as individuals, the holder of a note executed by the firm and the members individually is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from each, though the note was given for a firm liability. In re Carter (Iowa) 67 N. W. 239.

412 Ex parte Bevan, 10 Ves. 107.

413 2 Lindl. Partn. 747.

414 2 Lindl. Partn. 750.

CHAPTER VII.

ACTIONS BETWEEN PARTNERS.

127. Action on Partnership Claim or Liability—At Law.
128. In Equity.
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130. Actions between Firms with Common Member.
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144. Specific Performance.
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146. Receivers.

ACTION ON PARTNERSHIP CLAIM OR LIABILITY—AT LAW

127. A partner cannot maintain an action at law against his co-partner upon either

(a) An obligation to the firm from the defendant, or

(b) An obligation from the firm to the plaintiff.

In the absence of statute, there is no method by which an ordinary firm can sue or be sued as such; for the firm, as distinguished from the persons composing it, has no judicial existence. All proceedings, therefore, which have for their object the enforcement of partnership rights or partnership obligations, must be taken by or against the partners individually. It follows from this nonrecognition of the firm as an entity distinct from its members that no action at law can be maintained by a partner against his co-partners

upon a claim against the firm, and vice versa, that no action at law can be maintained against a partner by his co-partners upon a claim due the firm.[1]

The real reason why a partner cannot sue a co-partner upon a partnership claim or a partnership liability is that until there has been an accounting, and all the partnership affairs are settled, there is no cause of action in favor of any partner against any of his co-partners.[2] In Ives v. Miller,[3] Hand, P. J., said: "Until the affairs

[1] Ames, Cas. Partn. p. 449 et seq. "When a partnership is subsisting, and there is no liquidation of the accounts, though there is actually a balance of over £100 due to one partner, he [the creditor] cannot, upon such a debt, support a commission; but, had the partnership been determined, and had the solvent partner paid all debts, I should think he might sustain the commission." Lord Eldon, in Ex parte Nokes, 2 Mont. Bankr. p. 148, 1 Mont. & A. 47, note a. Persons participating in and financial subscribers to an effort to push a bill through parliament looking to the establishment of a railway enterprise are in so far partners that one of them who actually did the surveying has not an action against one or all of them to receive his compensation. Holmes v. Higgins, 1 Barn. & C. 74. One partner, who, being taken in execution of a judgment against his firm, pays the judgment with his private funds in order to regain his liberty, cannot, on the ground of compulsion, recover from his co-partner in execution. Sadler v. Nixon, 5 Barn. & Adol. 936 (Lord Denman). In an action on a contract between the parties whereby they had agreed to carry on business in a certain specified way, in which action the declaration set forth the agreement and alleged the defendant excluded the plaintiff from the management and profits of the business, and refused to make annual settlement and payments, and, although continuing the business on the premises and with the tools of the plaintiff, and making large profits, refused to recognize that plaintiff had any rights under the agreement, held, on demurrer, that the parties were partners, and the action therefore not maintainable. Ryder v. Wilcox, 103 Mass. 24.

[2] See Miner v. Lorman, 56 Mich. 212, 22 N. W. 265; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Niven v. Spickerman, 12 Johns. (N. Y.) 401; Halsted v. Schmelzel, 17 Johns. (N. Y.) 80; Casey v. Brush, 2 Caines (N. Y.) 293; Cf. Johnson v. Kelly, 4 Thomp. & C. (N. Y.) 417; Pattison v. Blanchard, 6 Barb. (N. Y.) 537; Ferguson v. Wright, 61 Pa. St. 258; Perley v. Brown, 12 N. H. 493; Young v. Brick, 3 N. J. Law, 241; Harris v. Harris, 39 N. H. 45; Scott v. Caruth, 50 Mo. 120; Chadsey v. Harrison, 11 Ill. 151; Burns v. Nottingham, 60 Ill. 531; White v. Ross, 35 Fla. 377, 17 South. 640; Lord v. Peaks, 41 Neb. 737, 60 N. W. 353; Remington v. Allen, 109 Mass. 47; Newby v. Harrell, 99 N. C. 149, 5 S. E. 284; O'Brien v. Smith, 42 Kan. 49, 21 Pac. 784. See also, cases

[3] 19 Barb. (N. Y.) 196, 200.

of the concern are wound up, what one partner may owe the firm is not a debt due to a co-partner; nor is the indebtedness of the firm to one of the members a debt due from the other members to

hereafter cited in this chapter. As to the right of an indorsee of a firm note to a partner to sue, see Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276; Walker v. Wait, 50 Vt. 668. Cf. Davis v. Merrill, 51 Mich. 480, 16 N. W. 864; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358. While a partnership exists or remains unsettled, no action at law can be maintained by one partner against another, except an action of account or assumpsit on a promise to account. Chase v. Garvin, 19 Me. 211; Burley v. Harris, 8 N. H. 233. See Estes v. Whipple, 12 Vt. 373; Graham v. Holt, 3 Ired. (N. C.) 300; Stothert v. Knox, 5 Mo. 112; Davenport v. Gear, 3 Ill. 495. The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck. Such balance is to be struck after all partnership affairs are settled. Gleason v. White, 34 Cal. 258; White's Adm'r v. Waide, Walk. (Miss.) 263. One partner cannot sue another, for his share, while their partnership accounts are unsettled. Dewit v. Staniford, 1 Root (Conn.) 270; Lamalere v. Caze, 1 Wash. C. C. 435, Fed. Cas. No. 8,003; Kennedy v. M'Fadon, 3 Har. & J. (Md.) 194; Ozeas v. Johnson, 1 Bin. (Pa.) 191; Young v. Brick, 3 N. J. Law, 241; Murray v. Bogert, 14 Johns. (N. Y.) 318; Springer v. Cabell, 10 Mo. 640; McKnight v. McCutchen, 27 Mo. 436; Robinson v. Green's Adm'r, 5 Har. (Del.) 115; Smith v. Smith, 33 Mo. 557; Ives v. Miller, 19 Barb. (N. Y.) 196; Lower v. Denton, 9 Wis. 268. Where a debt against a firm has been collected of one of the partners, he cannot sue the other partner at law for contribution, though the debt was paid out of his separate property. Lawrence v. Clark, 9 Dana (Ky.) 257. Partners cannot sue each other at law for any matter relating to the partnership concerns unless there has been a final settlement between them, the balance ascertained, and an express promise to pay the balance. Without a general adjustment of the partnership concerns, embracing all the partnership transactions, and concurred in by all the partners, there is no consideration to uphold an express promise of one partner to pay his co-partner a balance alleged to be due. Chadsey v. Harrison, 11 Ill. 151. See also, Phillips v. Blatchford, 137 Mass. 510; Fisher v. Sweet, 67 Cal. 228, 7 Pac. 657; Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208; Bullard v. Kinney, 10 Cal. 60; Learned v. Ayres, 41 Mich. 677, 3 N. W. 178. One of two partners cannot, at law, sue the other on his failure to perform a covenant to which they were both bound in liquidated damages by the articles of partnership. He must first apply to equity for a dissolution of the partnership. Stone v. Fouse, 3 Cal. 292. Where a trustee, under a deed of trust executed by one partner on partnership property as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession of the property, the other partner must resort to equity in order to recover it from the trustee, as one part owner cannot

him. The rights of the parties were very clearly stated by Lord Cottenham, so late as in 1838, in Richardson v. Bank of England.[4] That was a motion to compel a partner to pay into court a large sum, which it was insisted he had admitted he had drawn out, with the consent of the partners, before dissolution. The lord chancellor remarked upon the ordinary use of the words 'creditor' and 'debtor,' as applied to partners who advance to or draw money from the firm by consent, and added: 'But though these terms "creditor" and "debtor" are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings, either at law or in equity; assuming always that no separate security has been taken or given. The supposed creditor's debt is due from the firm of which he is a partner, and the supposed debtor owes the money to himself, in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners.' And again: 'But if, pending the partnership, neither law nor equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of accounts, and before the payment of the joint debt, or the realization of the partnership estate? Nothing is more settled than that, under such circumstances, what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained, by the winding up of the partnership affairs, neither party

maintain an action at law against his co-owner for the joint property. Hoff v. Rogers, 67 Miss. 208, 7 South. 358. A partner cannot maintain an action for partition against his co-partner as to real estate owned by the firm, where there has been no adjustment of the co-partnership accounts. MacFarlane v. MacFarlane, 82 Hun, 238, 31 N. Y. Supp. 272. See, also, post, p. 304, "Actions in Equity."

[4] 4 Mylne & C. 165.

has any remedy against or liability to the other for payment, from one to the other, of what may have been advanced or received.'"

There is another reason which is sufficient in many cases to explain the rule that a partner cannot maintain an action at law against his co-partner on a partnership claim or liability. This reason is that, wherever the partnership claim or liability on which the action is sought to be maintained is a joint one,[5] all the partners must be joined as plaintiffs or defendants, as the case may be.[6] Omission to join any partner may be pleaded in abatement of the action. It follows, therefore, that a partner suing on such a partnership claim or liability would have to be joined both as plaintiff and as a defendant. Now, at common law a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself either alone or in conjunction with others.[7]

Illustrations—Action on Obligations to Firm.

Under the first branch of the rule, a partner cannot maintain an action against his co-partner where the liability of the latter is in reality an obligation to the firm. Thus, one partner cannot maintain an action to recover the price of goods sold to another partner by the firm. This was held in an action of assumpsit by one of three partners in a steamboat against another, to recover one-third of the amount which the latter owed the firm for liquors bought by him at the bar of the boat. The partnership business had ceased, but its affairs had not been settled.[8] So, also, one partner is not

[5] See ante, p. 245.

[6] See post, p. 362.

[7] Story, Partn. 221; Bates, Partn. § 849; T. Pars. Partn. §§ 184, 185. "One member of a partnership cannot sue the firm at law for advances made by him to the joint concern, nor can the firm sue an individual partner for anything that he may have drawn out of the joint stock or proceeds, no matter how much more than his share it might have been; and the reason is that one man cannot occupy the double position of plaintiff and defendant at the same time. The aid of this court is just as necessary to settle the account of these advances as it is to settle the accounts arising out of the immediate transactions of the special business of the partnership." Bracken v. Kennedy, 3 Scam. (Ill.) 558, 564.

[8] Page v. Thompson, 33 Ind. 137. See, also, Ivy v. Walker, 58 Miss. 253; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797; Burley v. Harris, 8 N. H. 233. But see Bennett v. Smith, 40 Mich. 211.

liable to his co-partner for money had and received to the use of the firm,[9] nor for money lent by the firm.[10]

Same—Actions on Obligations to Partners.

Under the second branch of the rule stated in the black-letter text, a partner whose claim is really against the firm cannot recover any part thereof in an action against one or more of his co-partners. This has been held many times in actions for work and labor performed by one partner for the firm,[11] for money loaned the firm,[12] for goods sold to the firm,[13] for money paid for the firm,[14] for rent of premises occupied by the firm,[15] and other similar cases.

[9] Kutz v. Dreibelbis, 126 Pa. St. 335, 17 Atl. 609; Gardiner v. Fargo, 58 Mich. 72, 24 N. W. 655; Howard v. Patrick, 38 Mich. 795; Smith v. Smith, 33 Mo. 557; Towle v. Meserve, 38 N. H. 9; Young v. Brick, 3 N. J. Law, 241; Dana v. Gill, 5 J. J. Marsh. (Ky.) 242; Burney v. Boone, 32 Ala. 486; Bovill v. Hammond, 6 Barn. & C. 149; Fromont v. Coupland, 2 Bing. 170; Russell v. Byron, 2 Cal. 86.

[10] Gammon v. Huse, 9 Ill. App. 557; Pitcher v. Barrows, 17 Pick. (Mass.) 361; Fulton v. Williams, 11 Cush. (Mass.) 108; Temple v. Seaver, 11 Cush. (Mass.) 314; Thayer v. Buffum, 11 Metc. (Mass.) 398; Smith v. Lusher, 5 Cowen (N. Y.) 688; Crow v. Green, 111 Pa. St. 637, 5 Atl. 23; M'Fadden v. Hunt, 5 Watts & S. (Pa.) 468; Davis v. Merrill, 51 Mich. 480, 16 N. W. 864; Hill v. McPherson, 15 Mo. 204; Nevins v. Townsend, 6 Conn. 5; Simrall v. O'Bannons, 7 B. Mon. (Ky.) 608; Smyth v. Strader, 4 How. 404.

[11] Holmes v. Higgins, 1 Barn. & C. 74; Milburn v. Codd, 7 Barn. & C. 419; Lucas v. Beach, 1 Man. & G. 417, 425; Robinson v. Green's Adm'r, 5 Har. (Del.) 115; Duff v. Maguire, 99 Mass. 300; Younglove v. Liebhardt, 13 Neb. 557, 14 N. W. 526; Stone v. Mattingly (Ky.) 19 S. W. 402; Hills v. Bailey, 27 Vt. 548.

[12] Colley v. Smith, 2 Moody & R. 96; Perring v. Hone, 4 Bing. 28; Richardson v. Bank of England, 4 Mylne & C. 165; Gridley v. Dole, 4 N. Y. 486; Payne v. Freer, 91 N. Y. 43; Bracken v. Kennedy, 3 Scam. (Ill.) 558; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; O'Neill v. Brown, 61 Tex. 34; Wilson v. Soper, 13 B. Mon. (Ky.) 411; Mickle v. Peet, 43 Conn. 65.

[13] Course v. Prince, 1 Mill, Const. (S. C.) 416; Remington v. Allen, 109 Mass. 47; Bullard v. Kinney, 10 Cal. 60.

[14] Goddard v. Hodges, 1 Cromp. & M. 33; Brown v. Tapscott, 6 Mees. & W. 119; Sadler v. Nixon, 5 Barn. & Adol. 936; Leidy v. Messinger, 71 Pa. St. 177; Fessler v. Hickernell, 82 Pa. St. 150; Harris v. Harris, 39 N. H. 45; Torrey v. Twombly, 57 How. Prac. (N. Y.) 149; Ives v. Miller, 19 Barb. (N. Y.) 196; Phillips v. Blatchford, 137 Mass. 510; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170; Glynn v. Phetteplace, 26 Mich. 383; Murray v. Bogert, 14 Johns. (N. Y.) 318; Booth v. Bank, 74 N. Y. 228; Drew v. Ferson, 22 Wis. 651.

[15] Johnson v. Wilson, 54 Ill. 419; Pio Pico v. Cuyas, 47 Cal. 174; Estes v. Whip-

Same—Set-Off.

Of course, a claim which cannot be directly enforced by one partner against his co-partners, because falling under one or the other branches of the rule here under consideration, cannot be indirectly enforced as a set-off.[16]

SAME—IN EQUITY.

128. An obligation between a firm and one of its members can be enforced only by proceeding in equity for an accounting, except

EXCEPTION—Actions at law have been sustained in a few states in the following cases:

(a) Where the partnership has terminated, and the action is for a final, though unascertained, balance (p. 305).

(b) Where the partnership was for a single finished transaction (p. 307).

(c) Where the partnership affairs have been adjusted, except as to a single transaction (p. 308).

Since no cause of action exists between partners previous to an accounting upon a partnership claim or liability, if the partners do not voluntarily settle their accounts, the only method of enforcing an obligation between a firm and one of its members is an action for an accounting and settlement of the partnership affairs.[17] "Now, the settlement of all the partnership concerns is ordinarily, during the continuance of the partnership, unattainable at law; and

ple, 12 Vt. 373, Cf. Allen v. Anderson, 13 Ill. App. 451; Kinney v. Robison, 52 Mich. 389, 18 N. W. 120.

[16] Johnson v. Wilson, 54 Ill. 419; Hess v. Final, 32 Mich. 515; Gardiner v. Fargo, 58 Mich. 72, 24 N. W. 655; Elder's Appeal, 39 Mich. 474; Hewitt v. Kuhl, 25 N. J. Eq. 24; Cummings v. Morris, 25 N. Y. 625; Ives v. Miller, 19 Barb. (N. Y.) 196; Dodd v. Tarr, 116 Mass. 287; Neil v. Greenleaf, 26 Ohio St. 567; Linderman v. Disbrow, 31 Wis. 465; Tomlinson v. Nelson, 49 Wis. 679, 6 N. W. 366; Wharton v. Douglass, 76 Pa. St. 273; Love v. Rhyne, 86 N. C. 576; Wood v. Brush, 72 Cal. 224, 13 Pac. 627; Young v. Hoglan, 52 Cal. 466.

[17] Unless a settlement has been made, and a balance struck, between partners, the remedy, where there are two, is an action of account; where more than two, a bill in equity. Beach v. Hotchkiss, 2 Conn. 425.

even in equity it is not ordinarily enforced, except upon a dissolution of the partnership. If one partner could recover against his co-partners the whole amount paid by him on account of the partnership, they would immediately have a cross action against him for the whole amount or his share thereof; and, if he could recover only their shares thereof, then, in order to ascertain those shares, the full account of all the partnership concerns must be taken, and the partnership itself wound up." [18] "It is a general rule," said Abbott, C. J., in Bovill v. Hammond,[19] "that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law." [20] And in another case it was said: "The remedy in such cases is in equity, where the power to investigate accounts to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had." [21] The principles governing a partnership accounting in equity will be presently separately discussed.[22]

Exceptions—Massachusetts Rule.

It has been held in a few states that a balance due on a partnership account may be recovered in an action at law, provided the partnership has terminated, and the judgment will finally settle all questions between the parties growing out of the partnership affairs.[23] This doctrine was firmly established in Massachusetts at

[18] Story, Partn. § 221.

[19] 6 Barn. & C. 149, 151.

[20] No action at law will lie for the settlement of a partnership account where the number of the partners exceeds two, the only remedy in such case being by bill in chancery. Beach v. Hotchkiss, 2 Conn. 425. When a firm consists of only two members, assumpsit lies by one against the other to settle and adjust partnership affairs. Conn. Revision 1875, tit. 19, c. 7, § 5. The rights of partners inter se can be settled and determined at law as well as in equity. Wallace v. Hull, 28 Ga. 68.

[21] Ryder v. Wilcox, 103 Mass. 24, 31. Equity has plenary jurisdiction over partnership accountings. Bracken v. Kennedy, 3 Scam. (Ill.) 558.

[22] See post, p. 332.

[23] Fry v. Potter, 12 R. I. 542; Pettingill v. Jones, 28 Kan. 749; Wheeler v. Arnold, 30 Mich. 304; Pool v. Perdue, 44 Ga. 454. A partner cannot obtain judgment against his co-partners for a debt due him by the partnership, when it is shown that the partnership accounts are unsettled, and that the judgment asked for will not have the effect of a final liquidation of the partnership affairs. Austin v. Vaughan, 14 La. Ann. 43.

a time when there were no courts of equity in that state.[24] It is well stated by Bigelow, J., as follows: "By the well-settled rule of law in this commonwealth, an action may be well maintained by one co-partner against another to recover a final balance remaining due upon the close of business of a firm after its dissolution. Nor is it necessary that this should be a fixed ascertained balance as the result of a settlement of the accounts of the firm between the partners. It is enough if it appear that the firm is dissolved, and that there are no outstanding debts due to or from the co-partnership, so that the action of assumpsit to recover the balance due one of the firm will effect a final settlement between the co-partners." [25] In a much later case, Ames, J., said: "In the case of co-partners, neither a settlement of the accounts, nor an express promise to pay, need be proved, where the suit is assumpsit for a final balance." [26] It has been held that the remedy in equity given by statute does not affect the application of the rule to cases where the remedy by action at law is plain and adequate.[27] Where there are debts due the partnership outstanding, the action is not for a final balance, and cannot be maintained.[28] But the plaintiff may show that the outstanding debts of the partnership are incapable of collection, and thus that the judgment rendered will be a final settlement between the partners; and in such case, especially if an

[24] See Bond v. Hays, 12 Mass. 34; Fanning v. Chadwick, 3 Pick. 420; Brinley v. Kupfer, 6 Pick. 179; Williams v. Henshaw, 11 Pick. 79; Rockwell v. Wilder, 4 Metc. 556; Shepard v. Richards, 2 Gray, 424; Sikes v. Work, 6 Gray, 433; Shattuck v. Lawson, 10 Gray, 405; Wheeler v. Wheeler, 111 Mass. 247, 250; Wilkins v. Davis, 15 N. B. R. 60, Fed. Cas. No. 17,664.

[25] Sikes v. Work, 6 Gray (Mass.) 433, 434.

[26] Wheeler v. Wheeler, 111 Mass. 247, 250. "It has been held too often now to be questioned that assumpsit will lie to recover a final balance of a partnership account, and that this extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them. Brigham v. Eveleth, 9 Mass. 538; Jones v. Harraden, Id. 540; Bond v. Hays, 12 Mass. 34; Wilby v. Phinney, 15 Mass. 116; Fanning v. Chadwick, 3 Pick. (Mass.) 420; Brinley v. Kupfer, 6 Pick. (Mass.) 179. This rule is not only founded on authority, but is reasonable in principle, and convenient in practice." Williams v. Henshaw, 11 Pick. (Mass.) 79, 81.

[27] Fanning v. Chadwick, 3 Pick. (Mass.) 420; Shepard v. Richards, 2 Gray (Mass.) 424.

[28] Williams v. Henshaw, 11 Pick. (Mass.) 79, 82.

assignment of all the outstanding debts is seasonably given or tendered to the other party, the action will lie.[29] A partner cannot, however, by himself assuming all the outstanding debts due the firm, without any agreement or notice to his co-partner, maintain assumpsit against him for any balance which may be due.[30]

In Georgia it has been held that one partner may sue another at law, and recover if he is able to show that the affairs of the concern are so settled that the jury can ascertain what is justly due him, and settle the rights in dispute.[31] So, in a Michigan case, where there were no assets remaining after payment of the debts, it was held that the liability of one partner for money advanced by the other beyond his share of the debts after dissolution was a simple money demand, which could be settled in an action at law.[32] The court said: "There was no occasion for an accounting in equity, unless there had been such dealing with assets, as well as such private relations with the firm, as to make a settlement otherwise difficult; and there being only two partners concerned, and discovery being now obtainable as well at law as in equity, there would seem to be no very good reason why the remedy at law would not be entirely adequate. But, whether this would be difficult or not, it would be admissible to resort to it."

Same—Partnership in Single Transactions.

In Pettingill v. Jones,[33] Brewer, J., said: "Where there is but a single partnership transaction, one joint venture, which is fully closed, we think one partner may maintain an action against the other for his share of the profits of that single transaction, and that in such a case there is no necessity of a formal accounting between parties."[34] In Rhode Island an action to recover one-third of the losses of a land speculation was decided the same way.[35]

29 Id.

30 Williams v. Henshaw, 12 Pick. (Mass.) 378.

31 Pool v. Perdue, 44 Ga. 454.

32 Wheeler v. Arnold, 30 Mich. 304, 306.

33 28 Kan. 535. See, also, Clarke v. Mills, 36 Kan. 393, 13 Pac. 569.

34 Citing Sikes v. Work, 6 Gray (Mass.) 433; Wheeler v. Arnold, 30 Mich. 304.

35 Fry v. Potter, 12 R. I. 542, citing Robson v. Curtis, 1 Starkie, N. P. 78; Buckner v. Ries, 34 Mo. 357; Wright v. Cumpsty, 41 Pa. St. 102. See, also, Kutz v. Dreibelbis, 126 Pa. St. 335, 17 Atl. 609. But cf. Dowling v. Clarke, 13 R. I. 134.

The court said: "There was no general co-partnership, but only an agreement to share the gains and losses of a particular adventure, the entire capital for which was furnished by the plaintiff's testator. There were no joint debts or liabilities, and no mutual claims subsisting to be adjusted. The transaction was closed, and the losses ascertained. Nothing remained for the defendant to do but pay his share of them. The case is not intrinsically distinguishable from an ordinary case in assumpsit, and, even without precedent, we should have little difficulty in maintaining the action." Bates says: [36] "This exception is not clearly established, for some of the cases are not true partnership, but are mere joint ventures. The courts at one time apparently were in the habit of calling any contract relation a partnership in which an accounting could be demanded."

Same—Single Unadjusted Item.

Where a partnership has been dissolved, and the partners have accounted with each other as to everything except as to one item, one may maintain an action at law against the other for his share of the item.[37]

SAME—UNDER THE CODE.

129. The codes of procedure abolishing the distinctions between actions at law and suits in equity do not authorize the maintenance of an action by one partner against his co-partner for money due on an unsettled partnership account.

Under the reformed codes of procedure, there is but one form of action, called a "civil action," and this action embraces all that was formerly comprehended both by actions at law and suits in equity. In equity, a partner could sue his co-partner, and obtain an adjustment of the partnership affairs, and thus recover his whole

[36] Partn. § 865.

[37] Whetstone v. Shaw, 70 Mo. 575; Purvines v. Champion, 67 Ill. 459; Farwell v. Tyler, 5 Iowa, 535; Brown v. Agnew, 6 Watts & S. (Pa.) 235. One partner may sue another for his interest in a note when it does not appear from the pleadings that there were any partnership transactions to be settled, except the division of such note. Moran v. Le Blanc, 6 La. Ann. 113.

interest therein. He can do the same thing under the code, but the action does not thereby become an action at law; nor can the suit be maintained unless the case made by the pleadings and proof is such as would formerly have called for the interposition of a court of equity. It is, as formerly, an appeal to the power of a court of chancery; and the case will fail if it be not such as gives a right to invoke that power. It is a mistake to suppose that, under the code, a suit may be maintained which must formerly have failed both at law and in equity.[38]

ACTIONS BETWEEN FIRMS WITH COMMON MEMBER.

130. No action at law can be maintained on an obligation between two firms having a common member, but a remedy may be had in equity.

This rule follows as a corollary to the rule that a partner cannot maintain an action against his co-partner upon a partnership claim or liability. The objections to the maintenance of such an

[38] Page v. Thompson, 33 Ind. 137. Under the statutes of Minnesota, one partner cannot demand merely a judgment for money against a co-partner any more than he could have maintained an action at law. Russell v. Minnesota Outfit, 1 Minn. 162 (Gil. 136). See, also, Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526. "By the Code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction. But, while this is so in reference to the form and course of proceeding in the action, the principles by which the rights of the parties are to be determined remain unchanged. The Code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before; but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. The question, therefore, is whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the Code, have sustained an action at law or a suit in equity." Cole v. Reynolds, 18 N. Y. 74, 76. Cf. post, p. 313.

action are equally fatal to an action between two firms having a common member. Owing to the nonrecognition of the firm as an entity, such an action, of course, would be one between a partner and his firm on a partnership account, and the fact that there are other co-partners does not alter the case in the least. There is the same necessity for taking the partnership accounts, and the same necessity for joining the common partner, both as a plaintiff and as a defendant. The cases are unanimous in holding that, under these circumstances, the action cannot be maintained at law, and they are equally unanimous in holding that a remedy exists in equity. But here the unanimity ceases, and upon the question of how equity will proceed to enforce the rights of the parties the few cases that exist show much confusion and conflict.

The confusion seems to have been caused by the failure to distinguish between the question of what rights equity will enforce, and the entirely distinct question of how those rights will be enforced.[39] The difficulty has been assumed to be merely a technical one, growing out of the common-law rule that all the members of a firm must unite in bringing an action, and the consequent necessity of making the common partner both a plaintiff and a defendant. But the difficulty lies deeper. It is admirably stated by Mr. James Parsons as follows:[40] "The difficulty, however, does not arise from procedure, and is not obviated by a resort to a remedy in equity.[41] The obstacle is equally formidable in equity. The common member of two firms must be put by the decree in one firm or the other. If he is held a plaintiff, he may be the debtor

[39] This distinction was recognized in a recent case, where the action was under the Code. The court said: "At present the question is not how the matter is to be adjusted, or what recovery shall be allowed, but only as to whether the action can be maintained at all." Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526.

[40] Partn. § 162.

[41] Nor do codes abolishing the distinctions between actions at law and suits in equity obviate the difficulty. They do not profess to create new causes of action. But see post, p. 313, and note 46. Mr. Pollock, speaking of the English statute authorizing suits against partnerships in the firm name, says that such statute does not introduce anything that amounts to the recognition of the firm as an artificial person, distinct from its members, and that actions between a firm and one of its own members, or between two firms having a common member, remain inadmissible in England. Partn. art. 67, pp. 121, 122.

in the defendant firm, and a decree might enable him to compel his co-partners, who are already his creditors in the defendant firm, to pay an additional debt for him. He might collect the debt out of their separate estate, or he might turn around and pay it himself, by setting off his debt, release his co-partners defendants, compound the debt, or delay its collection, at his discretion; and the only redress of his plaintiff co-partners would be an account. If he is made a defendant, he is excluded from the plaintiff firm by his co-partners, although he is entitled to a share of its property, and to a joint control in the business. He is compelled to pay his co-partners in the plaintiff firm, not their quota of the claim, but the whole amount, which is more than they could receive if it was his individual debt. They might collect all from him. They might seize and sell his separate estate to pay the debt. He might be a creditor of his co-partners, and yet they would collect more out of him, instead of setting off what they owed him in payment of the claim."

Mr. Parsons comes to what seems the only logical conclusion, viz. that the equities of each individual partner must be worked out, although this involves a dissolution of both firms.[42] In this conclusion he is supported by a writer in the American Law Review,[43] and by the case of Rogers v. Rogers;[44] and this view is the only

[42] Partn. § 163. In Crosby v. Timolat, 50 Minn. 171, 174, 52 N. W. 526, the court said: "Nor, at law, would the contract or agreement between the two firms having a common member be recognized as creating a legal obligation or cause of action. The transaction would be treated as an attempt by a party to enter into contract with himself. The remedial system of the common law was too inflexible and restricted to enable it to adjust the complex rights and obligations of the parties under such circumstances. But, in equity, the agreements of the members of firms so related to each other were treated as obligatory; and the fact that one of the parties to the joint contract stood in the position of both an obligor and obligee did not stand in the way of affording such relief or remedy as might be found to be appropriate and necessary to the ends of justice." See, in addition to cases cited in this case, Hall v. Kimball, 77 Ill. 161; Beacannon v. Liebe, 11 Cr. 443, 5 Pac. 273. Where one, who is a member of two firms, makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon it in his own name. Moore v. Gano, 12 Ohio, 300. After the death of a person who was partner in two firms, the survivors of one may maintain an action against the survivors of the other partnership. Lacy v. Le Bruce, 6 Ala. 904.

[43] Volume 5, p. 47.

[44] 5 Ired. Eq. (N. C.) 31.

one consistent with the rule as to actions between partners all of the same firm, where, as has been seen, the only action, either at law, in equity, or under the code, that a partner can maintain against his co-partner upon a partnership obligation, is an action for an accounting and settlement of the affairs of the firm. In the case of Rogers v. Rogers, the court says: "If, however, John C. Rogers [the common partner] should refuse to become paymaster to John C. Rogers & Co. [the creditor firm], or be already so far a debtor to that firm that the other members, Hugh Rogers and Lowe, are unwilling to take him alone for the debt of Rogers & Otey, then their course is to stop their business; and, upon the settlement of it, this debt of Rogers & Otey will, as a part of the assets, be allotted to one of the partners in his share, and he can have relief on his own bill." In this case, the plaintiff, John C. Rogers, was a member of the firm of John C. Rogers & Co., and also of the firm of Rogers & Otey. The latter firm having become indebted to the former, a suit in equity was brought in the same firm, as though the two firms were composed of strangers. Ruffin, C. J., before whom the cause came, emphatically denied that such suit could be maintained. "It is unnecessary," he says, "to consider the various matters stated in Otey's answer that might affect the merits of the controversy as between him and the other parties, as it is impossible that there can be any decree for the plaintiffs on this bill. It seems to have been drawn on some vague sort of notion that the firms are in the nature of corporations, and that one of them might have a decree against the other as firms. The bill involves the absurdity of a man's having a personal decree against himself for a sum of money; and that, too, coupled with a decree against another person in such a manner as to enable the supposed creditors to raise the whole debt out of this latter person, although, as between that person and his partner (who is also a partner in the other firm), it might appear, upon taking the accounts of their firm, that the latter holds the fund out of which the debt ought to be paid." "In the present state of things, the court does not see, nor can the accounts be taken that will enable the court to see, who is the proper person to pay, and to receive this money. It may be that John C. Rogers [the common partner] is the hand in the firm of Rogers & Otey from which the money ought to go, and also that in the

other firm which ought to hold it. There can therefore be no decree for the plaintiffs. Not one against Otey alone, because no several liability on his part is alleged, nor anything to except John C. Rogers from paying or contributing to payment of the debt; and not one against Rogers by himself, or jointly with Otey, because it would be to pay John C. Rogers himself jointly with others, and for that reason would be repugnant, absurd, and void." [45]

Bates states the opposite view as follows: "In equity, however, and under the codes, where equitable remedies will be granted in the courts in all actions, the firms can be parties to such suits much as if they constituted distinct legal bodies, although there is a partner common to each; and hence, under the code, which administers equitable legal remedies without distinction, the suit can be sustained." [46] This is, perhaps, the general statement of the rule by text writers and judges. It is obviously open to the criticism that it confuses the question of what rights will be recognized in equity, with the question of how those rights will be enforced. The firm can no more sue as such in equity than at law, nor does the code change this rule.[47] However much the fact of partnership may be taken into view in adjusting the rights of the partners, still the suit is one between individuals only. Cole v. Reynolds [48] is the leading case in support of this view. Two firms, in each of which A. was a partner, stated an account of their mutual

[45] See, also, to same effect, Englis v. Furniss, 4 E. D. Smith (N. Y.) 587.

[46] Partn. § 905. In Pennsylvania it is provided by statute that partners may be both plaintiffs and defendants in the same action. Act April 14, 1838 (Pepper & L. Dig. 1894, "Partnership," § 3). Speaking of this act, Mr. J. Parsons says: "The act does not enable a partner to sue his firm. (Acc. Hall v. Logan, 34 Pa. St. 331.) An independent plaintiff is required, who is not also liable on the contract which he seeks to enforce. The evil is more extensive than the remedy provided. The limited scope and technical character of the statute make the form of procedure control the right." Partn. § 161. Party joining in promise cannot sue his co-promisors. Price v. Spencer (1870) 7 Phila. 179; Wentworth v. Raignel (1873) 9 Phila. 275. Cf. Duff v. Maguire, 107 Mass. 87, and Bryant v. Wardell, 2 Exch. 479. In an action under the statute, where the same person is joined with plaintiff and with defendant, the execution is limited to the joint assets. Tassey v. Church, 6 Watts & S. (Pa.) 465. Cf. Cole v. Reynolds, 18 N. Y. 74, where practically the same result was reached without any statute.

[47] See ante, p. 310.

[48] 18 N. Y. 74.

dealing. The partners in the creditor firm, with the exception of A., who declined to be plaintiff, and was made a defendant, brought their action against the members of the debtor firm; and it was held that, upon proof of these facts, the plaintiffs were entitled to judgment for the balance thus ascertained, and that it was not necessary in such a case that the complaint should propose an accounting as between the firms or the various partners, but that such accounting might be directed by the court if facts were pleaded and shown that would render it inequitable to permit a recovery by one firm against the other, without adjusting the accounts of the individuals composing them. Even in such case the court thought that the better doctrine would be to let the debtor firm pay its debt, and the partners in the creditor firm, after receiving their debt, adjust their individual equities among themselves. The effect of this decision was to hold that two of the partners might have judgment against the debtor firm, including their own co-partner, for a debt due to their own firm, the debt so recovered to be held as assets of the firm, and that this might be done without an accounting, except as between the two firms. By such a decree, the common partner is deprived of all possession and control of a portion of the partnership property,—a right inherent in the relation of partnership. The court solves the difficulty arising from his being a member of both firms by completely ignoring his rights in the creditor firm, and treating him only as a debtor.

ACTION AT LAW ON INDIVIDUAL OBLIGATION.

131. A partner may maintain an action at law against his co-partner upon a claim due to the one from the other as individuals. The following classes of cases fall within the above rule:

(a) Claims not connected with the partnership (p. 315).

(b) Claims for an agreed final balance (p. 315).

(c) Claims upon express personal contracts between partners (p. 317).

SAME—CLAIMS NOT CONNECTED WITH PARTNERSHIP.

132. A partner may maintain an action at law against his co-partner upon claims not connected with the partnership.

It is hardly necessary to say that the mere fact that persons are partners as to certain transactions is no defense to an action between them upon a claim in no manner connected with the partnership affairs. As to matters outside of the partnership business, they are not partners, and may sue and be sued precisely as strangers. Thus, where one partner has sold his separate property to his co-partner, he may maintain an action at law for the price.[49]

SAME—CLAIMS FOR AGREED FINAL BALANCES.

133. A final settlement of the partnership affairs converts the liabilities between each partner and the firm into liabilities between the partners individually, and an action at law lies to recover the balance found due any partner.

It has been seen that a partner cannot maintain an action at law for a balance on the partnership account until the accounts have been settled and adjusted. But where the partners themselves state the account, and agree upon the balances due any partner, all objection to the maintenance of an action at law is removed. The settlement converts the liabilities between each partner and the firm into liabilities between the parties as individuals, and an action at law may be maintained thereon.[50] To have this effect, however, the settle-

[49] Elder v. Hood, 38 Ill. 533.

[50] Purvines v. Champion, 67 Ill. 459; Hanks v. Baber, 53 Ill. 292; Fanning v. Chadwick, 3 Pick. 420; Williams v. Henshaw, 11 Pick. 79; Scott v. Caruth, 50 Mo. 120; Holman v. Nance, 84 Mo. 674; Knerr v. Hoffman, 65 Pa. St. 126; Mackey v. Auer, 8 Hun (N. Y.) 180; Jaques v. Hulit, 16 N. J. Law, 38; Nims v. Bigelow, 44 N. H. 376; McGehee v. Dougherty, 10 Ala. 863; Wray v. Milestone, 5 Mees. & W. 21; Halderman v. Halderman, Hemp. 559, Fed. Cas. No. 5,909. In the above cases there was no express promise to pay the balance due. In a number of cases it has

ment must be a final winding up of the partnership affairs.[51] A partial settlement will not support an action at law, unless there is

been said that proof of an express promise to pay the balance is necessary to maintain the suit; but this is not the better view. See Gulick v. Gulick, 14 N. J. Law, 578; Murray v. Bogert, 14 Johns. (N. Y.) 318; Clark v. Dibble, 16 Wend. (N. Y.) 601; Koehler v. Brown, 31 How. Prac. (N. Y.) 235; Goldsborough v. McWilliams, 2 Cranch, C. C. 401, Fed. Cas. No. 5,518; Foster v. Allanson, 2 Term R. 479. A partner may maintain an action at law against his co-partner for an amount found to be due him upon a settlement and account stated, without proof of an express promise to pay such balance. Wycoff v. Purnell, 10 Iowa, 332. See, also, Purvines v. Champion, 67 Ill. 459; Cochrane v. Allen, 58 N. H. 250. One of many persons who had agreed to pay a subscription in installments to push a joint enterprise, sharing profits, but losses to affect each of them only to the amount of his subscription, having defaulted in his second installment after promising another partner to pay it, such other partner, after advancing money for the expenses of the enterprise, may sue the first, as being liable on an account stated, although he could not be sued on partnership accounts. Brown v. Tapscott, 6 Mees. & W. 119. When parties buying and selling wool together as partners settle their accounts, in which appears an item charging one of them with £15 "loss on wool," and the latter party expressly assents to the charge, an action is maintainable to recover the amount. In such an action it is no answer that the plaintiff agreed to take the money out in butcher's meat. Wray v. Milestone, 5 Mees. & W. 21, Lord Abinger, C. B., and Parke, Alderson, and Maule, BB. Where a partnership has been dissolved, and in the settlement one partner has become the owner of the accounts payable to the firm, such partner may maintain an action at law against the other for moneys collected and withheld from him. Glade v. White, 42 Neb. 336, 60 N. W. 556. "It is the law that one partner cannot sue another to recover profits or to recover his share of partnership assets where the patnership is unsettled, although he may sue for an accounting and for the recovery of whatever may be found due on a settlement of the partnership affairs. But this rule does not apply to all cases growing out of partnership contracts. Where there is an agreement adjusting partnership affairs, and that agreement awards to one partner a specific sum, or creates a specific duty in his favor, he may maintain an action upon a breach of the duty or promise. Snyder v. Baber, 74 Ind. 47; Warring v. Hill, 89 Ind. 497; Lawrence v. Clark, 9 Dana (Ky.) 257; Foster v. Allanson, 2 Term R. 479; Wright v. Hunter, 1 East, 20; Neil v. Greenleaf, 26 Ohio St. 567; Wells v. Carpenter, 65 Ill. 447." Douthit v. Douthit (Ind. Sup.) 32 N. E. 715. Where partners agree, under seal, to dissolve, and that one of them shall have all the debts due the firm, he may maintain general assumpsit against the others for a debt due from them to the firm. Beede v. Fraser, 66 Vt. 114, 28 Atl. 880.

[51] Burns v. Nottingham, 60 Ill. 531; Ross v. Cornell, 45 Cal. 133; Arnold v. Arnold, 90 N. Y. 580; De Jarnette's Ex'r v. McQueen, 31 Ala. 230. As to what is a final settlement, see Bates, Partn. §§ 859, 860.

an express promise to pay the balance found due.[52] But, where the settlement is a final winding up of the partnership affairs, the law will imply a promise to pay the balance.[53] If, after a final settlement, the business is nevertheless continued, an action cannot be maintained to recover the agreed balance unless there was an express promise to pay it.[54] But where there was an express promise to pay the balance, as where a note is given for the amount found due, an action may be maintained, though the business is carried on.[55]

SAME—EXPRESS CONTRACTS BETWEEN PARTNERS.

134. A partner may sue his co-partner at law upon an express contract between them by which the defendant bound himself personally to the plaintiff.

Where persons who are partners have contracted together on their own behalf, and not on behalf of their firm, and the transaction is not such a one as the firm would have a right to take advantage of, the rights and obligations created are individual rights and obligations, and an action at law may be maintained upon the contract.[56] It is

[52] Davenport v. Gear, 3 Ill. 495; Burns v. Nottingham, 60 Ill. 531; Westerlo v. Evertson, 1 Wend. (N. Y.) 532; Murdock v. Martin, 12 Smedes & M. 661.

[53] See cases cited supra, notes 50, 51.

[54] Allan v. Garven, 4 U. C. Q. B. 242; Fromont v. Coupland, 2 Bing. 170.

[55] Preston v. Strutton, 1 Aust. 50; Sturges v. Swift, 32 Miss. 239; McSherry v. Brooks, 46 Md. 103; Rockwell v. Wilder, 4 Metc. (Mass.) 556; Van Amringe v. Ellmaker, 4 Pa. St. 281.

[56] Bedford v. Brutton, 1 Bing. N. C. 399; Ryder v. Wilcox, 103 Mass. 24. Any partner, ultimately bound for the partnership debts, may sue his co-partner to apply the partnership property to such debts. Gridley v. Conner, 2 La. Ann. 87. Action at law may be maintained for breach of an express contract between the partners. Sprout v. Crowley, 30 Wis. 187. Action at law may be maintained for breach of contract independent of partnership. Mullany v. Keenan, 10 Iowa, 224. If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it, and if it is made by them in their own names, and not in the name of the firm, an action may be maintained thereon by one against the others, during the continuance of the partnership. Wright v. Michie, 6 Grat. (Va.) 354. A partner may sue his co-partners upon an independent contract made by them as a firm with him before the partnership was formed between him and them. Mullany v. Keenan, 10 Iowa, 224.

immaterial whether the contract relates to the partnership business or not, or whether it was entered into before the partnership was formed, after it was terminated, or during its continuance.[57] The right of the parties to such a contract may be determined without a settlement of the partnership accounts, and does not involve the necessity of making a party both plaintiff and defendant. The fact that a balance may be due the defendant from the plaintiff upon other transactions involving a partnership accounting is immaterial, for, as has been seen, such transactions are not a matter of set-off.[58]

Illustrations.

Where the contract does not relate to the partnership business, the right to maintain an action thereon is clear. But the mere fact that the contract does relate to the partnership business does not alter the case, where the contract was the individual contract of the partners, and not a contract of the firm.[59] Illustrations of cases

[57] "The real test is, not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." Bates, Partn. § 878. See, also, cases cited infra.

[58] A note given by one partner to the other for a balance in liquidation of the affairs of the firm may be the subject of an action of law, although there are subsequent accounts in which the payee may be subsequently found in arrears. Preston v. Strutton, 1 Anstr. 50. There are many deeds of co-partnership in which the partners covenant each to advance a certain sum at first. In such case an action will lie by one partner against the other to enforce the covenant, notwithstanding that there may be subsequent accounts between them upon which a court of equity must adjudicate. Venning v. Leckie, 13 East, 7. In this case the defendant agreed in writing to take one-half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof,—the goods bought to be paid for by bills. Where one gives a promissory note to his retiring partner for firm funds advanced by the latter, and used in the business, failure of consideration, based upon the alleged facts that no final settlement of the firm affairs has ever been had, and that upon such settlement there would be nothing due the payee, is no defense to an action at law upon said note. Wilson v. Wilson, 26 Or. 251, 38 Pac. 185. One who is clerk, and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity without resorting to a suit for the settlement of the partnership transactions. Alexander v. Alexander, 12 La. Ann. 588. A stipulated compensation may be recovered at law, though payable out of profits. Robinson v. Green's Adm'r, 5 Har. (Del.) 115.

[59] A promissory note given by one to another member of a commercial company

where actions at law have been allowed on contracts entered into by partners before the formation of the partnership, but relating to it, are numerous. Thus, an action at law will lie for breach of an agreement to form a partnership, or to continue a partnership for a fixed time.[60] Where one partner lends another money to be used by the latter as his contribution to capital, the transaction is purely an individual one, and the money may be recovered in an action at law.[61] Where there is an agreement to buy a half interest in a stock of goods, and to enter into partnership with the seller, the interest bought to be put in as capital, the purchase price may be recovered at law. The purchase is not a partnership transaction. The interest must be purchased before it can be put in as capital.[62] So, one partner may sue his co-partner at law, and recover a premium promised by the latter to procure admission to the firm.[63]

An action at law between partners will lie for breach of an agreement to pay firm debts out of defendant's private funds, or to in-

may be sued on by the payee, notwithstanding the relation of parties, and the fact that the money, when recovered, would belong to the company. Van Ness v. Forrest, 8 Cranch, 30. A partner may sell his interest to his co-partners, and recover the purchase price in an action at law, and it is immaterial whether such interest is incumbered or not by the terms of the partnership, or whether its amount is fixed or the price agreed on. Baker v. Robinson, 55 Mo. App. 171. See, also, supra, notes 56 and 57.

60 The remedy for violation of an agreement for a future partnership is exclusively at law. Lane v. Roche, Riley, Eq. (S. C.) 215. See Gale v. Leckie, 2 Starkie, 107; Wilson v. Campbell, 10 Ill. 383; Hill v. Palmer, 56 Wis. 123, 13 N. W. 20; Vance v. Blair, 18 Ohio, 532; Goldsmith v. Sachs, 17 Fed. 726. See, also, cases cited in note 67, infra. An action lies to recover damages for a wrongful dissolution. Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Bagley v. Smith, 10 N. Y. 489; Dunham v. Gillis, 8 Mass. 462; Reiter v. Morton, 96 Pa. St. 229; Addams v. Tutton, 39 Pa. St. 447; Wadsworth v. Manning, 4 Md. 59; Jones v. Morehead, 3 B. Mon. (Ky.) 377.

61 Helme v. Smith, 7 Bing. 709, 714. An action at law can be maintained by one partner against another partner in the same firm, upon an express promise, made before the commencement of the partnership, in respect to advances to be made to constitute the capital of the company for the carrying on of the business of the partnership. Currier v. Webster, 45 N. H. 226. See, also, to like effect, Smith v. Kemp, 92 Mich. 357, 52 N. W. 639; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Bull v. Coe, 77 Cal. 54, 18 Pac. 808.

62 Kinney v. Robison, 52 Mich. 389, 18 N. W. 120.

63 Walker v. Harris, 1 Anstr. 245.

demnify plaintiff from all liability thereon;[64] for breach of agreement to pay for personal services out of private funds;[65] and for breach of agreement to render accounts.[66] "An agreement to pay money or to furnish stock for the purpose of launching the partnership is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his co-partner."[67]

[64] Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Shennefield v. Dutton, 85 Ill. 503; Kellogg v. Moore, 97 Ill. 282; Adams v. Funk, 53 Ill. 219; Halliday v. Carman, 6 Daly (N. Y.) 422; Cilley v. Van Patten, 58 Mich. 404, 25 N. W. 326; Jewell v. Ketchum, 63 Wis. 628, 23 N. W. 709; Frow's Estate, 73 Pa. St. 459; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Miller v. Bailey, 19 Or. 539, 25 Pac. 27. A promise by a continuing partner to reimburse a retiring partner for taking up, by his individual note, a partnership note on which the latter is still liable, but which the former has at the dissolution promised to pay, will sustain an action; a demand, whether necessary or not, having been first made. Warbritton v. Cameron, 10 Ind. 302. Generally, as to breach of contract assuming debt, Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Thropp v. Richardson, 132 Pa. St. 399, 19 Atl. 218. A bond given on the dissolution of a firm by one partner for the payment of all the firm debts can be enforced only by the obligee. When one partner indebted to the firm gives his note to the other therefor, it is a valid counterclaim or set-off in an action on a bond executed upon dissolution of the firm by the payee to the maker for the payment of the partnership debts. Merrill v. Green, 55 N. Y. 270.

[65] Paine v. Thacher, 25 Wend. (N. Y.) 450; Aldrich v. Lewis, 60 Miss. 229.

[66] Owston v. Ogle, 13 East, 538; Foster v. Allanson, 2 Term R. 479; Want v. Reece, 1 Bing. 18; Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351; Gillen v. Peters, 39 Kan. 489, 18 Pac. 613; Wilby v. Phinney, 15 Mass. 116; Holyoke v. Mayo, 50 Me. 385; Bailey v. Starke, 6 Ark. 191; Rose v. Roberts, 9 Minn. 119 (Gil. 109). But see McPherson v. Robertson, 82 Ala. 459, 2 South. 333.

[67] Cook v. Canny, 96 Mich. 398, 55 N. W. 987. One partner may sue another at law on a note given by the latter to the former for the payment of a part of the capital stock. Grigsby's Ex'r v. Nance, 3 Ala. 347; Scott v. Campbell, 30 Ala. 728. See, also, Sprout v. Crowley, 30 Wis. 187; Brown v. Tapscott, 6 Mees. & W. 119. If, by an agreement under seal between two persons, one agrees to furnish a specified sum of money to carry on a certain business of the parties, and afterwards fails to furnish the money, he is liable to the other at law for such breach of contract. Ellison v. Chapman, 7 Blackf. (Ind.) 224. See, also, cases cited in note 60, supra.

A suit by a partner against his co-partner, upon a claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of co-partnership, need not be delayed for the taking of an account of the partnership affairs.[68] A partner satisfying a judgment against himself upon an indorsement made by his co-partner in violation of the articles, is entitled to reimbursement for the costs paid in such satisfaction, as well as for the amount of the judgment otherwise.[69]

Partners may, by special agreement touching any part of the partnership's concerns, withdraw the same from the partnership account, and make the agreement the foundation of an action at law. Thus, where one of two partners, by agreement between them, takes certain specific articles of partnership property, and agrees to pay his co-partner for his share thereof a definite sum, at a specified time, the co-partner may maintain an action to recover the amount so agreed to be paid, independent of the settlement of the partnership accounts.[70]

[68] Read v. Nevitt, 41 Wis. 348; Hill v. Palmer, 56 Wis. 123, 13 N. W. 20; Moritz v. Peebles, 4 E. D. Smith (N. Y.) 135; Kinloch v. Hamlin, 2 Hill, Eq. (S. C.) 19; Dunham v. Gillis, 8 Mass. 462; Hunt v. Reilly, 50 Tex. 99; Dana v. Gill, 5 J. J. Marsh. (Ky.) 242; Radenhurst v. Bates, 3 Bing. 463. But see Stone v. Fouse, 3 Cal. 292; Ridgway v. Grant, 17 Ill. 117. An action at law may be sustained by one co-partner against another to recover damages for a breach of the articles or terms of the contract. Terry v. Carter, 25 Miss. 168; Kinloch v. Hamlin, 2 Hill, Eq. (S. C.) 19. One partner cannot maintain an action at law on the covenants in the articles of co-partnership to recover damages of his co-partner for neglect of the partnership business, while there is a considerable amount due from him to his co-partner, and the debts due by and to the firm, the burden of which is to be borne, and the benefit enjoyed, by the partners in certain proportions, are not all settled. Capen v. Barrows, 1 Gray (Mass.) 376. See, also, Patterson v. Burton, 3 N. J. Law, 289; Bracken v. Kennedy, 3 Scam. (Ill.) 558. A suit at law may be maintained for a breach of partnership articles where the business of the partnership has not been commenced, and there are no accounts in dispute between the partners. Vance v. Blair, 18 Ohio, 532. Where one partner has made profits, by engaging in any other business in violation of his contract, his co-partner has his option to sue for damages for the breach of the contract, or to bring a bill in equity to compel an accounting. Moritz v. Peebles, 4 E. D. Smith (N. Y.) 135.

[69] Stone v. Wendover, 2 Mo. App. 248.

[70] Neil v. Greenleaf, 26 Ohio St. 567; Jackson v. Stopherd, 2 Cromp. & M. 361. See, also, Roberts v. Ripley, 14 Conn. 543; Russell v. Grimes, 46 Mo. 410; Adams v. Funk, 53 Ill. 219. Where one partner purchases the interest of the other part-

SAME—LOSSES CAUSED BY PARTNER'S WRONG.

135. A partner may maintain an action at law against his co-partner for a loss caused by the latter's wrongful act, provided,

(a) The plaintiff's loss was suffered individually, and not in his capacity as a partner, and

(b) The defendant would not have been entitled to contribution had he alone paid the loss.

ner in the concern, the sale dissolves the partnership, and the partner purchasing may be sued at law for the amount agreed to be paid by him for such interest. Edens v. Williams, 36 Ill. 252. As to conversion of partnership property into separate property, see ante, p. 277. As a rule, assumpsit will not lie by one partner against his co-partner, in respect to any matter connected with the partnership transactions, or which would involve the consideration of their partnership dealing. Yet one may sustain an action against his co-partner on an express contract or covenant to do or omit any particular act not involving any question as to the general accounts. And when the parties, by an express agreement, separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specified sum for that matter, assumpsit will lie on the agreement, though the matter arose from the partnership dealing. Collamer v. Foster, 26 Vt. 754. "It is quite clear," says T. Parsons on Partnership (4th Ed., § 190), "that certain particular and distinct transactions may be separated from the affairs or business of the partnership, by the agreement of the parties. Then those persons who are concerned in this separated matter are not as partners to each other, although in all other business relations they remain partners." Where partners agree to divide a partnership debt, and the debtor assents to it, and promises one of the partners to pay him his moiety, such partner may maintain an action for his moiety against the debtor. 1 Lindl. Partn. 265, citing Blair v. Snover, 10 N. J. Law, 153. After a dissolution, and a balance has been struck and agreed upon by the partners, one may maintain assumpsit against the other to recover his balance upon an implied promise. Spear v. Newell, 13 Vt. 288, 292; Warren v. Wheelock, 21 Vt. 323; Gibson v. Moore, 6 N. H. 547; Wilby v. Phinney, 15 Mass. 121; Wheeler v. Wheeler, 111 Mass. 247. Assumpsit lies where, after dissolution and settlement, one partner received more than was his due. Bond v. Hays, 12 Mass. 34. And see Clark v. Dibble, 16 Wend. (N. Y.) 601; Beede v. Fraser, 66 Vt. 114, 28 Atl. 880. "Upon the general rule of law, there is no difficulty. One partner cannot maintain an action for a balance on the partnership accounts until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made; but there may be special bargains by which particular transactions are isolated and separated from the winding up of the concern,

Where one partner commits a distinct tort against his co-partner, in no way connected with the partnership business, he is liable in an action at law as any one else would be.[71] Thus, when one partner injures the separate property of his co-partner used in the firm business, he is liable in an action at law.[72] But the wrongful act may be in some way connected with the partnership, and still it may create an individual liability to his co-partner, enforceable at law. Thus, fraud in inducing another to enter into a partnership is actionable at law.[73] So, where a partner, in fraud of his co-partners, gives a note in the name of the firm for a private debt of his own, he is liable to his co-partners in an action at law for the amount they have been compelled to pay.[74] But, if the note should be paid out of firm assets, it is apprehended that an action at law would not lie; for, until an accounting and settlement of the part-

and are taken out of the general law of partnership. When we consider the circumstances of this case, plaintiff's right of action may be put upon the footing of a separate transaction." Bayley, B., in Jackson v. Stopherd, 2 Cromp. & M. 361, 365. Partners may separate any portion of their partnership affairs from the rest, and submit it to arbitrators for adjustment; and, if a sum is found due from one to the other, a promise to pay that sum is binding, and an action may be sustained upon it, notwithstanding the other partnership concerns remain unsettled. Gibson v. Moore, 6 N. H. 547. When a firm has been dissolved, and one partner has assumed the entire control of the goods, an action may be brought by such partner against another partner to whom he has sold a portion of the goods, at the other's request, and on a promise to pay him, and not the firm. Caswell v. Cooper, 18 Ill. 532. An action at law is maintainable by one partner against another upon a promissory note executed by the one to the other, involving particular items or transactions of the partnership business. Wilson v. Wilson, 26 Or. 251, 38 Pac. 185.

71 Pierce v. Thompson, 6 Pick. (Mass.) 192; Queen v. Mallinson, 16 Q. B. 367.

72 Haller v. Willamowicz, 23 Ark. 566.

73 Boughner v. Black's Adm'r, 83 Ky. 521; Rice v. Culver, 32 N. J. Eq. 601; Morse v. Hutchins, 102 Mass. 439; Perry v. Hale, 143 Mass. 540, 10 N. E. 174; More v. Rand, 60 N. Y. 208.

74 Calkins v. Smith, 48 N. Y. 614, usually cited in support of this proposition, is not an action against a partner at all. All it really decided is that the fraud is not upon the firm, but upon the innocent partners, and that the cause of action arising therefrom is no part of the partnership assets. It does not decide that one partner may maintain an action at law without an accounting, where the note was paid out of partnership assets. See, also, T. Pars. Partn. § 203; Cross v. Cheshire, 7 Exch. 43; Osborne v. Harper, 5 East, 225.

nership affairs, it is impossible to say what, if anything, the plaintiff has suffered.[75] Non constat the wrongdoing partner may be found entitled to the whole of the partnership assets upon an accounting. So, also, one partner cannot maintain an action at law against his co-partner for neglect of the partnership business, because the loss is suffered, not individually, but through the diminution of the partnership assets. Until a settlement of the partnership accounts, the damage cannot be ascertained.[76] In some cases, as has been seen, a partner is entitled to contribution to a loss, al-

[75] Sweet v. Morrison, 103 N. Y. 235, 240, 8 N. E. 396, was an action by one partner against his co-partner to recover damages for fraud practiced upon him by them in the discharge of a debt due the partnership from a third person. The court held that, while defendants were liable for damages so caused, a partnership settlement was necessary. The court said: "Sweet may recover, not the debt due to the firm, for that is discharged, but damages for the fraud practiced upon him in the process. This is his individual right, and the resultant damages can only be measured by his individual loss; and that loss, if it exists at all, must necessarily be, and can only be, a diminution of his partnership share, produced by a collusive waste of partnership assets. But he has not proved any such loss. It cannot be known, until a settlement of the partnership accounts, what loss has resulted from the fraud. Payson, Canda & Co. are not bound to pay Sweet's firm or Sweet's partners anything. Primarily, the action is by Sweet against his co-partners for a partnership settlement, in which he charges them with the willful and fraudulent waste of a valuable claim, and holds the debtors responsible also by reason of their collusive participation. That is the sole theory upon which the action can be maintained. To Sweet's partners, and to his firm, nothing is due from Payson, Canda & Co., and they can be compelled to pay only what is needed to perfect Sweet's rights, as disclosed by an honest settlement." See, also, Fuller v. Percival, 126 Mass, 381; Emery v. Parrott, 107 Mass. 95; Osborne v. Harper, 5 East, 225. As to rights against third persons, growing out of a partner's wrongdoing, see post, p. 371.

[76] Capen v. Barrows, 1 Gray (Mass.) 376. See, also, cases cited in note 68, supra. That one partner fraudulently converts to his own use property supplied by another for the partnership use dissolves the partnership, or, at least, gives the injured party a legal right of action. Crosby v. McDermitt, 7 Cal. 146. Where one partner mixed partnership funds with his own, made deposits of them in bank in his own name, appropriated them to his own use, assuming the absolute and entire control, and the bank, becoming insolvent, received its notes, and had them registered in his own name, without the consent or knowledge of his co-partner, by reason whereof the partnership funds were lost, *held*, that such partner was responsible to the co-partner for his share of the fund, and must bear the loss alone. Lefever v. Underwood, 41 Pa. St. 505.

though caused by his own wrong.[77] In such a case, if any partner pays more than his share, he, nevertheless, cannot recover it in an action at law against any of his co-partners.[78] Obviously, if one partner is entitled to contribution from his co-partners, he cannot be regarded as a wrongdoer as to them. Equally obvious is it that a partnership accounting would be necessary to ascertain whether any partner had, in fact, paid more than his share, and, if so, how much.

EQUITABLE ACTIONS IN GENERAL—JURISDICTION.

136. The jurisdiction of equity over partnership affairs is governed by ordinary principles, but, owing to the complex nature of the relation, equity has come to be the chief tribunal for the settlement of partnership controversies.

We have seen in what cases an action at law can be maintained between partners. It may be stated as a general rule that in all other cases equity has jurisdiction to grant the appropriate relief. The exercise of jurisdiction is governed by ordinary principles. Equity will not interfere where there is a plain adequate remedy at law, but the nature of a partnership is such that the questions arising between partners almost always fall within the recognized rules governing the jurisdiction of courts of equity.[79]

General Rules as to Interference between Partners.

There are three general rules by which courts of equity are influenced when their interference is sought by one partner against another, and to which it will be convenient at once to refer; for the same rules are observed in all actions for specific performance, for an account, for a receiver, for an injunction, and in those actions for fraud in which equitable relief, as distinguished from the simple recovery of damages, is sought. The rules in question, however,

[77] Ante, p. 175.

[78] Story, Partn. § 220; Pearson v. Skelton, 1 Mees. & W. 504.

[79] Generally, as to jurisdiction of equity over partnerships, see Story, Eq. Jur. § 666; Bisp. Eq. § 505; Christy's Appeal, 92 Pa. St. 157; Epping v. Aiken, 71 Ga. 682; Bracken v. Kennedy, 3 Scam. (Ill.) 558.

have no application to cases in which one partner may sue another at law. The rules alluded to are (1) not to interfere except with a view to dissolve the partnership; (2) not to interfere in matters of internal regulation; (3) not to interfere at the instance of persons who have been guilty of laches.

SAME—NECESSITY OF PRAYING FOR A DISSOLUTION.

137. The old rule not to interfere except with a view to a dissolution has been much relaxed, but not to the extent of requiring equity to undertake the management of a going concern.[80]

Formerly, courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose of dissolving the partnership; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found, on reference to the older reported decisions, that, if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed; it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time, so difficult is it to shake off old associations, and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in actions for an account, or for an injunction, one of the first points for consideration, even now, when one partner sues another for equitable relief, is, can relief be had without dis-

[80] The text of this and the two following sections is substantially that of Mr. Lindley. See Lindl. Partn. pp. 465–476.

solving the partnership? Undoubtedly, it may, much more certainly than formerly, but not always when perhaps it ought.

Modern Rule.

Without stopping to inquire how the question is to be answered in any particular case, it may be stated as a general proposition that courts will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to continued wrong or to a dissolution;[81] and that, rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have declined to do so.[82] At the same time, courts will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will not interfere at all, unless for the purpose of winding up the partnership.

SAME—NONINTERFERENCE IN MATTER OF INTERNAL REGULATION.

138. A court of equity will not interfere in a matter of merely internal regulation.

A court of justice will not interfere between partners merely because they do not agree.[83] It is no part of the duty of the court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution, or an order for an injunction, or a receiver.[84] And, when partners have themselves agreed that the management of their affairs shall be intrusted to one or more of them exclusively, the court will not remove the managers, or interfere with them, unless they are

81 See Fairthorne v. Weston, 3 Hare, 387, 392.

82 See Davis v. Davis, 60 Miss. 615; Traphagen v. Burt, 67 N. Y. 30.

83 But see Davis v. Davis, 60 Miss. 615; Pirtle v. Penn, 3 Dana (Ky.) 247.

84 See Marshall v. Colman, 2 Jac. & W. 266; Anderson v. Anderson, 25 Beav. 190; Smith v. Jeyes, 4 Beav. 503; Cofton v. Horner, 5 Price, 537. See, also, post, p. 405.

clearly acting illegally, or in breach of the trust reposed in them.[85] The rule not to interfere in matters of merely internal regulation or discipline is strongly exemplified in cases of clubs.[86]

SAME—EFFECT OF LACHES.

139. Equity will not interfere at the instance of persons who have been guilty of laches.

Laches a Bar to Relief in Equity.

Independently of the statute of limitation, a plaintiff may be precluded by his own laches from obtaining equitable relief. Laches presupposes not only lapse of time, but also the existence of circumstances which render negligence imputable; and, unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the court, acting on the maxim, "Vigilantibus non dormientibus subveniunt leges," will decline to interfere.[87]

To a Suit for an Account.

In the early case of Sherman v. Sherman,[88] two persons had dealings as merchants. One of them died. His widow filed a bill for an account, but, although the statute of limitations did not apply, the bill was dismissed, on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber.[89]

Acquiescence in Account.

Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court will not reopen it, although the account may be shown to be erroneous, and although

[85] See Lawson v. Morgan, 1 Price, 303; Waters v. Taylor, 15 Ves. 10.

[86] See Foss v. Harbottle, 2 Hare, 461; Gormon v. Russell, 14 Cal. 531; Burke v. Roper, 79 Ala. 138; Mozley v. Alston, 1 Phil. Ch. 790; Carlen v. Drury, 1 Ves. & B. 154.

[87] Evans v. Smallcombe, L. R. 3 H. L. 249, 256; Groenendyke v. Coffeen, 109 Ill. 325; Drew v. Beard, 107 Mass. 64; Stout v. Seabrook's Ex'rs, 30 N. J. Eq. 187; Richards v. Todd, 127 Mass. 167; Hoyt v. Sprague, 103 U. S. 613; Pond v. Clark, 24 Conn. 370.

[88] 2 Vern. 276.

[89] See, also, Sturt v. Mellish, 2 Atk. 610.

no final settlement was ever come to.[90] The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into.[91]

Laches in Enforcing Agreements for Partnerships.

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward, and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success. Thus, in Cowell v. Watts[92] the plaintiff and the defendant had agreed to take land for the purpose of improving it, and letting it upon building leases. A long lease was accordingly obtained, and was taken in the name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. The defendant also assumed to act as sole owner of the land obtained. He removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months, the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and, the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed, with costs, on the ground that the plaintiff had, by his conduct, induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

[90] Scott v. Milne, 5 Beav. 215; s. c., on appeal, 7 Jur. 709; Bell v. Hudson, 73 Cal. 285, 14 Pac. 791; Hite's Heirs v. Hite's Ex'rs, 1 B. Mon. (Ky.) 177; Coleman v. Marble, 9 La. Ann. 476.

[91] Thornton v. Proctor, 1 Anst. 94.

[92] 2 Hall & T. 224.

Laches where Partnership is a Mining Partnership.

The doctrine now under discussion is especially applicable to mining and other partnerships of a highly speculative character. Mining operations are so extremely doubtful as to their ultimate success that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid. If, therefore, a person engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his co-partners, and he then comes forward, insisting on his rights as a partner, and seeks equitable, as distinguished from legal, relief, he will be refused it, on the ground that he has applied for it too late.[93] On this principle, in Senhouse v. Christian,[94] where several persons were lessees of a colliery, and, the lease being about to expire, one of them obtained a renewal of it in his own name, Lord Rosslyn dismissed, with costs, a bill filed by the others, claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed, at a great expense; and, although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterwards. This case was referred to with approbation by Lord Eldon, in the case of Norway v. Rowe,[95] in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but whose rights had been long denied. Again, in Prendergast v. Turton,[96] where the capital subscribed for working a mine was spent, and the plaintiffs refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward, claiming their shares in the concern, their bill was dismissed by Vice Chancellor Knight-Bruce, and his decision was affirmed

[93] See, in addition to cases cited below, Alloway v. Braine, 26 Beav. 575; Walker v. Jeffreys, 1 Hare, 341.

[94] 19 Beav. 356, note, also cited in Norway v. Rowe, 19 Ves. 157.

[95] 19 Ves. 144.

[96] 1 Younge & C. Ch. 98; s. c., on appeal, 13 Law J. Ch. 268.

on appeal. The same doctrine was applied in Clegg v. Edmondson,[97] the facts of which were similar to those of Senhouse v. Christian, already referred to. In two respects, Clegg v. Edmondson goes further than the other cases; for, first, the defendants had brought in no fresh capital, the mine having paid its own expenses; and secondly, although the plaintiffs had not asserted their claims by legal proceedings, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by Lord Justice Turner that he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded.[98] In Rule v. Jewell[99] a member of a cost-book mining company, which was seriously in debt, had his shares forfeited for nonpayment of calls. After five years, he disputed the validity of the forfeiture, and claimed to be reinstated as a partner. But it was held that he was precluded by his own laches from obtaining relief.

Effect of Evidence of Abandonment.

In the cases already referred to, it will be observed that there was no positive evidence that the plaintiff had ever abandoned his rights;[100] and in Clegg v. Edmondson there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely be observed that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time, during which nothing had been done by the plaintiff, greatly improves the position of his opponent. There are several cases illustrating this. In Finckle v. Stacy,[101] two artificers agreed to do

97 8 De Gex, M. & G. 787.

98 "This general proposition must, of course, be taken with reference to the case before the court. It cannot be laid down as universally true that protests are useless. They exclude inferences which in their absence might fairly be drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended." Lindl. Partn. p. 470, note b.

99 18 Ch. Div. 660.

100 In Prendergast v. Turton, supra, perhaps there was, and it is on the ground that there was that Lord Chelmsford distinguished that case from Clarke v. Hart, 6 H. L. Cas. 633, affirming 6 De Gex, M. & G. 232.

101 Macn. Sel. Cas. 9.

work for their joint benefit. After the work was done, the person for whom it was done refused to pay. The defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of the work done by him, and obtained a verdict. The plaintiff then claimed half the amount recovered, but the court held that he was not entitled to any share of it. So, if a part-owner of a ship disapproves of a proposed voyage, and arrests the ship until the other part owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage.[102] A fortiori, if a partner formally withdraws from an adventure when its prospects are bad, will he be unable to claim a share of the profits resulting from it if it ultimately proves to be profitable.[103] Such cases, however, are not so much cases of laches as of estoppel or agreements to release.

ACCOUNTING AND DISSOLUTION.

140. Equity has jurisdiction of an action for the dissolution of a partnership and an accounting.

Dissolution.

The remedy of a partner who insists upon a dissolution, which is opposed by his co-partners, is by a suit in equity for a dissolution and an accounting.[104] An injunction and a receiver to restrain the defendants from dealing with the partnership assets, and from issuing bills or notes in the name of the firm, may be sought and granted in the same action. The action lies, although the partnership be a partnership at will, and can therefore be dissolved

[102] Davis v. Johnston, 4 Sim. 539.

[103] M'Lure v. Ripley, 2 Macn. & G. 274.

[104] Lindl. Partn. 492. Equity has jurisdiction to settle up the affairs of the partnership, and make whatever orders are necessary to do complete justice. Story, Partn. § 222; Denver v. Roane, 99 U. S. 355; Ambler v. Whipple, 20 Wall. 546; Clagett v. Kilbourne, 1 Black, 346; Sharp v. Hibbins, 42 N. J. Eq. 543, 9 Atl. 113; Harvey v. Varney, 98 Mass. 118; Miller v. Lord, 11 Pick. (Mass.) 11; Bracken v. Kennedy, 4 Ill. 558; Clark v. Gridley, 41 Cal. 119.

by the plaintiff himself;[105] and, if the partnership has been dissolved before the action is brought, the plaintiff is entitled to a declaration to that effect.[106] If the partnership is admitted, and the right to dissolve is not contested, the court will decree a dissolution on motion, before the hearing or trial.[107] An action may be brought for the rescission of a contract of partnership, or in the alternative, for dissolution of the partnership.[108] The grounds on which the court will dissolve a partnership will be considered hereafter in the chapter on "Dissolution."[109] In the present chapter it is proposed to consider the subjects of account, injunctions, and receivers.

Accounting.

One of the most ancient common-law actions was the action of account. It could, however, be brought only in a limited class of cases. The proceeding under it was cumbersome in the extreme, and courts of common law could not compel a discovery from the parties, who were incompetent to testify. It is not surprising, therefore, that the common-law action of account should have fallen into disuse. It was to some extent supplanted at law by the action of assumpsit. The equitable procedure, however, was greatly superior to that of the common-law tribunals, whatever form of action might be adopted. A master in chancery had abundant power to examine the parties on oath, to make inquiries from all proper persons by testimony on oath, and to require the production of all necessary documents.[110] Equity has plenary jurisdiction in the matter of a partnership accounting. It extends to all matters necessary to wind up the partnership affairs, including the sale of real estate.[111]

105 Lindl. Partn. p. 491; Master v. Kirton, 3 Ves. 74.

106 Lindl. Partn. p. 492.

107 Thorp v. Holdsworth, 3 Ch. Div. 637.

108 Bagot v. Easton, 7 Ch. Div. 1.

109 Post, p. 393.

110 Fetter, Eq. p. 248.

111 Bates, Partn. 907; Denver v. Roane, 99 U. S. 355; Clark v. Gridley, 41 Cal. 119; Bracken v. Kennedy, 3 Scam. (Ill.) 558; Gillett v. Hall, 13 Conn. 426; Niles v. Williams, 24 Conn. 279; Bennett v. Woolfolk, 15 Ga. 213. As to the common-law action account, see Lee v. Abrams, 12 Ill. 111; Bracken v. Kennedy, 3 Scam. (Ill.) 558; Hunt v. Gorden, 52 Miss. 195; Stuart v. Kerr, Morris (Iowa) 240; Neal v. Keel's Ex'rs, 4 T. B. Mon. (Ky.) 162; Wilhelm v. Caylor, 32 Md.

SAME—RIGHT TO ACCOUNTING.

141. Every partner is entitled to an account from his co-partners.

142. ACCOUNTING UPON DISSOLUTION — A partner may maintain a bill for an accounting where there has either been a dissolution, or he has grounds to seek one.

It has been seen that the rule of equity not to interfere in partnership affairs except with a view to a dissolution has been relaxed. The application of this rule to actions for an accounting will be presently examined, but in cases where there has been a dissolution, or where grounds for a dissolution exist, and one is sought by the bill, the right of a partner to maintain the bill is undoubted.[112]

151; Appleby v. Brown, 24 N. Y. 143; Rickey v. Bowne, 18 Johns. (N. Y.) 131; Griffith v. Willing, 3 Bin. (Pa.) 317; Spear v. Newell, 2 Paine, 267, Fed. Cas. No. 13,224. Generally as to partnership accounting, see Lilliendahl v. Stegmair, 45 N. J. Eq. 648, 18 Atl. 216; Niles v. Williams, 24 Conn. 279; Gillett v. Hall, 13 Conn. 426; Cox v. Volkert, 86 Mo. 505. The fact that the prayer of the complaint, in a suit to dissolve a partnership, asked damages, as well as an accounting and a receiver, does not make the action one at law. Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607. In an action for an accounting between partners on a dissolution, the court will be governed, so far as it is reasonable, by the articles of agreement between the parties. Leighton v. Clarke, 42 Neb. 427, 60 N. W. 875. In a suit for the dissolution and settlement of a partnership, a personal judgment should not be rendered against one partner for the amount supposed to be due to the other as his share of the profits until the assets are reduced to cash and the debts paid, there being no agreement to the contrary. Green v. Stacy, 90 Wis. 46, 62 N. W. 627.

[112] Persons claiming under a partner may sometimes maintain an action for an accounting. Thus, personal representatives of a deceased partner may do so. Hackwell v. Eustman, Cro. Jac. 410; Heyne v. Middlemore, 1 Rep. Ch. 138; Miller v. Jones, 39 Ill. 54; Jennings' Adm'rs v. Chandler, 10 Wis. 21; Freeman v. Freeman, 136 Mass. 260; Grim's Appeal, 105 Pa. St. 375; Costley v. Towles, 46 Ala. 660; Denver v. Roane, 99 U. S. 355. Cf. Griffith v. Vanheythuysen, 9 Hare, 85; Hutton v. Laws, 55 Iowa, 710, 8 N. W. 642; State v. Brower, 93 N. C. 344; Newell v. Humphrey, 37 Vt. 265. Widow and heirs cannot, their remedy being to compel the representative to act or account. Hutton v. Laws, 55 Iowa,

The right of every partner to have an account from his co-partners of their dealings and transactions is too obvious to require comment. An action for an account may be maintained by partners,

710, 8 N. W. 642; Harrison v. Righter, 11 N. J. Eq. 389; Tate v. Tate, 35 Ark. 289; Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659; Ludlow v. Cooper, 4 Ohio St. 1. For exceptions to this doctrine, see Bates, Partn. § 925. The assignee of a partner's interest may maintain the bill. Strong v. Clawson, 10 Ill. 346; Miller v. Brigham, 50 Cal. 615; Donaldson v. Bank, 1 Dev. Eq. (N. C.) 103; Farley v. Moog, 79 Ala. 148; Bank v. Carrollton Railroad, 11 Wall. 624; Mathewson v. Clarke, 6 How. 122. See, generally, Bates, Partn. § 927. A purchaser of a partner's share on execution is entitled to an account from the solvent partners, as is also the execution debtor himself. Lindl. Partn. p. 493; Habershon v. Blurton, 1 De Gex & S. 121; Perens v. Johnson, 3 Smale & G. 419; Dutton v. Morrison, 17 Ves. 193, 196; Newhall v. Buckingham, 14 Ill. 405; Farley v. Moog, 79 Ala. 148; Hubbard v. Curtis, 8 Iowa, 1; Barrett v. McKenzie, 24 Minn. 20; Clement v. Foster, 3 Ired. Eq. (N. C.) 213; Knerr v. Hoffman, 65 Pa. St. 126. A creditor at large of the firm has no right to an accounting. Clement v. Foster, 3 Ired. Eq. (N. C.) 213; Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Young v. Frier, 9 N. J. Eq. 465; Mittnight v Smith, 17 N. J. Eq. 259; Freeman v. Stewart, 41 Miss. 138; Reese v. Bradford, 13 Ala. 837. Some courts have held surviving partners as trustees, and allowed the creditor to maintain a bill to wind up the partnership, and the same reasoning has been applied in cases of insolvency. Bates, Partn. § 929, cases cited. See, also, Davis v. Grove, 2 Rob. (N. Y.) 134, 635; Sanderson v. Stockdale, 11 Md. 563; Bardwell v. Perry, 19 Vt. 292, 302, 303; Fiske v. Gould, 12 Fed. 372; Johnston v. Straus, 26 Fed. 57; Fitzpatrick v. Flannagan, 106 U. S. 648, 656, 1 Sup. Ct. 369. Creditors of deceased partner, like the widow and heirs, must enforce their rights through a personal representative. Lindl. Partn. p. 494. A subpartner has no right to an accounting from the principal firm or any of the members of it except the one with whom he is a subpartner, for there is no contract or privity except between those two. Lindl. Partn. p. 493; Burnett v. Snyder, 81 N. Y. 550; Shearer v. Paine, 12 Allen (Mass.) 289; Reilly v. Reilly, 14 Mo. App 62; Bates, Partn. §§ 163, 928. An employé compensated by a share of the profits may maintain a bill for an accounting. Bentley v. Harris, 10 R. I. 434; Hallett v. Cumston, 110 Mass. 32; Channon v. Stewart, 103 Ill. 541; Harrington v. Churchward, 6 Jur. (N. S.) 576; Rishton v. Grissell, 5 Eq. Cas. 326; Lindl. Partn. p. 493. See, generally, Freeman v. Freeman, 136 Mass. 260; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258. The fact that defendant in an action for an accounting denied his partnership with complainants did not deprive him of the right to a just statement of the account on his being found to be a partner. Thompson v. Noble (Mich.) 65 N. W. 563. Where, after dissolution of a partnership, all the assets are left in the hands of one partner to settle the partnership affairs, the co-partner is entitled to an accounting, although the evidence shows the defendant has paid out more in satisfaction

although the partnership accounts are not complicated,[113] and although an action for damages may be sustainable,[114] and although the defendant may have stolen or embezzled the money of the firm.[115] Moreover, although formerly the court of chancery would

of firm debts than he has received from the assets. Sharp v. Hibbins, 42 N. J. Eq. 543, 9 Atl. 113. Where an employé of a firm receives a portion of the net profits of a branch of the business as part compensation for his services, equity will have jurisdiction of a bill by his employé for an account of the partnership affairs for the purpose of ascertaining the profits of such business, although the complainant is not a partner. Channon v. Stewart, 103 Ill. 541. See, also, Hargrave v. Conroy, 19 N. J. Eq. 281; Hallett v. Cumston, 110 Mass. 32; Clark v. Gridley, 41 Cal. 119. The statute of limitations applies to actions of account between partners. The statute does not begin to run against each item of an account between partners from the time it becomes a part of the account, but, if part be within six years, it draws that which is before after it. Todd v. Rafferty's Adm'rs, 30 N. J. Eq. 254. A cause of action for an accounting of the affairs of a partnership does not necessarily accrue, for the purpose of setting the statute of limitations in motion, at the exact date of the dissolution of the partnership, by death or otherwise; but a court of equity may postpone the period, if the survivor, of necessity or by consent, continues in control of the property until the purpose of such control is accomplished, or the survivor has openly asserted an adverse claim. Thomas v. Hurst, 73 Fed. 372. Where a co-partnership has ceased to do business more than six years, the right to have an account and settlement is barred by limitations. Stovall v. Clay (Ala.) 20 South. 387. See ante, p. 328. In an action for a partnership accounting, equity will refuse to interfere on the ground that the claim is stale where plaintiff has allowed 25 years to elapse before attempting to enforce his rights, during all of which time he had knowledge of all the facts, and there was no impediment to the prosecution of his claim, and plaintiff has made no demand upon defendant, nor in any way asserted his claim. The objection may be raised by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, and see elaborate note to this case in 2 Am. St. Rep. 795. An accounting may be had of the affairs of an illegal partnership where it is completed. Brooks v. Martin, 2 Wall. 70; Harvey v. Varney, 98 Mass. 118; Bfeuffer v. Maltby, 54 Tex. 454. The complaint in an action for an accounting need not specify the particular transactions as to which the accounting will be required. Teschmacher v. Lenz, 82 Hun, 594, 31 N. Y. Supp. 543. On a bill for an accounting between partners, the burden of proof is on plaintiff to establish the partnership, and to show by the accounts that a true balance can be stated. Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. 849.

[113] Cruikshank v. M'Vicar, 8 Beav. 106.

[114] Wright v. Hunter, 5 Ves. 792; Blain v. Agar, 1 Sim. 37, 2 Sim. 289; Townsend v. Ash, 3 Atk. 336.

[115] Roope v. D'Avigdor, 10 Q. B. Div. 412.

not entertain a suit for damages merely, although the suit was in form a suit for an account,[116] yet, in a partnership suit involving a general account, claims were adjusted which in ordinary cases would have formed the subject of an action at law;[117] and it is apprehended that now the court will, in taking such an account, deal with every claim which it may be necessary to investigate in order to adjust and finally settle the account. Disputes not affecting the accounts will naturally be excluded from it.[118]

143. ACCOUNTING WITHOUT DISSOLUTION—A partner may sometimes maintain a bill for an accounting without a dissolution. The following are the principal classes of cases in which an accounting without a dissolution will be granted:

(a) Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction (p. 339).

(b) Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or drive him to a dissolution (p. 339).

(c) Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all (p. 341).

(d) Where there is an agreement for periodical accountings or accountings as to distinct transactions (p. 343).

(e) Where an execution or attachment has been levied against one partner's interest (p. 343).

[116] Duncan v. Luntley, 2 Macn. & G. 30. See, also, Clifford v. Brooke, 13 Ves. 132; Tannenbaum v. Armeny, 81 Hun, 581, 31 N. Y. Supp. 55.

[117] See Bury v. Allen, 1 Colly. Ch. 589; MacKenna v. Parkes, 36 Law J. Ch. 366, 15 Wkly. Rep. 217. Cf. Great Western Ins. Co. v. Cunliffe, 9 Ch. App. 525.

[118] Lindl. Partn. p. 493. In an action for an accounting, it is error to give plaintiff judgment against defendants jointly for the full amount of his claim, without adjudging the respective liabilities of defendants. Gimpel v. Wilson, 10 Misc. Rep. 153, 30 N. Y. Supp. 942.

General or Limited Account.

The account which a partner may seek to have taken may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership, or a more limited account, directed to some particular transaction as to which a dispute has risen. It was formerly considered that no account between partners could be taken in equity, save with a view to a dissolution;[119] and a bill praying an account, but not a dissolution, has been held bad on demurrer.[120] But this rule has been gradually relaxed, for it has been felt that more injustice frequently arose from the refusal of the court to do less than complete justice than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved.[121] Accordingly, in Prole v. Masterman,[122] where the promoter of a company sought to make his co-promoters contribute to a debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect of other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of the moneys due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree for the payment of what is so due, without involving himself in any general account of the dealings and transactions of the society, or seeking for a dissolution thereof.[123] The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of

119 Lindl. Partn. p. 495; Forman v. Homfray, 2 Ves. & B. 329; Loscombe v. Russell, 4 Sim. 8; Knebell v. White, 2 Younge & C. Exch. 15. See, also, Glynn v. Phetteplace, 26 Mich. 383; Phillips v. Blatchford, 137 Mass. 510; Davis v. Davis, 60 Miss. 615; Coville v. Gilman, 13 W. Va. 319; Clark v. Gridley, 41 Cal. 119.

120 Loscombe v. Russell, 4 Sim. 8.

121 See ante, p. 334.

122 21 Beav. 61. Cf. Munnings v. Bury, Tam. 147.

123 See Bromley v. Williams, 32 Beav. 177; Hutchinson v. Wright, 25 Beav. 444; Taylor v. Dean, 22 Beav. 429.

the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no reason for departing from it.[124]

Account Where One Partner Withholds What the Firm is Entitled to.

Where one partner has obtained a secret benefit, which, upon principles already discussed, all the partners are entitled to, but from which he seeks to exclude his co-partners, they can obtain their share of such benefit by an action for an account, and such action is sustainable, although no dissolution is sought.[125] The equity of the firm, however, is against the delinquent partner only, and where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their co-partner, the plaintiffs have no locus standi against a person with whom the agreement has been entered into by such partner, and cannot therefore restrain such persons from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their co-partner, and claim from him the benefit of the agreement into which he has entered.[126]

Account in Cases of Exclusion.

Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or to drive him to dissolution, an account has been directed, although no dissolution has been asked.[127] The general proposition that courts of equity would interfere under the circumstances now sup-

124 See Ambler v. Whipple, 20 Wall. 546; Patterson v. Ware, 10 Ala. 444; Fairchild v. Valentine, 7 Rob. (N. Y.) 564.

125 Lindl. Partn. 495. See, also, Hichens v. Congreve, 1 Russ. & M. 150; Fawcett v. Whitehouse, Id. 132; Beck v. Kantorowicz, 3 Kay & J. 230; Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 559; Davis v. Davis, 60 Miss. 615; Traphagen v. Burt, 67 N. Y. 30.

126 Lindl. Partn. 496; Alder v. Fouracre, 3 Swanst. Ch. 489. Where defendant transferred certain partnership property to a third person, his co-partner is not obliged to rely on an action for damages, but may sue for an accounting, and compel a surrender of his share of the proceeds of such sale. Tannenbaum v. Armeny, 81 Hun, 581, 31 N. Y. Supp. 55.

127 Davis v. Davis, 60 Miss. 615; Traphagen v. Burt, 67 N. Y. 30; Knowles v. Haughton, 11 Ves. 168; Harrison v. Armitage, 4 Madd. 143; Blisset v. Daniel, 10 Hare, 493.

posed was laid down in Harrison v. Armitage,[128] where, however, no account was directed, inasmuch as the evidence did not establish a partnership. But in Chapple v. Cadell [129] an account was directed at the suit of a minority, where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him. Richards v. Davies [130] went a step further. There a partnership had been entered into for a term of years, which was still unexpired. The defendant would come to no account with the plaintiff respecting the partnership dealings and transactions, but, on the application of the plaintiff, a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judgment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that, if a court of equity refused him relief, he would be wholly without remedy; and in answer to the objection that, if such a suit were entertained, the defendant might be vexed by a new bill whenever new profits accrued,[131] his honor asked what right would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

Defendant Seeking to Drive Plaintiff to Dissolve.

Fairthorne v. Weston [132] is another authority in point. In that case two solicitors entered into partnership for a term of years, and, before the term expired, the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief except with a view to a dissolution; but the court held otherwise, and observed that there was no universal rule to the effect that a bill, asking for a particular account, but not for a dissolution, was demurrable; and that, if

[128] 4 Madd. 143. [129] Jac. 537. [130] 2 Russ. & M. 347.

[131] This objection was made by Lord Eldon in Forman v. Homfray, 2 Ves. & B. 330; by Vice Chancellor Shadwell in Loscombe v. Russell, 4 Sim. 8; and by Baron Alderson in Knebell v. White, 2 Younge & C. Exch. 15.

[132] 3 Hare, 387.

there were any such rule, a person fraudulently inclined might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist.[133] Upon the same principle, it is apprehended that if a partner is wrongfully expelled, and he is restored to his status as a partner by the judgment of the court, an account will be directed, but the partnership will not necessarily be dissolved.[134]

Account Where Concern has Failed.

Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all, such an account will be directed, although a dissolution is not asked for.[135] The leading case in support of this proposition is Wallworth v. Holt,[136] in which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a bill by some of the stockholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees, and public officer of the company, and certain shareholders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money, and applied towards the satisfaction of the partnership debts. The bill in this case was filed for the sole purpose of having the assets of the company applied in payment of its joint debts. It did not pray an account of the partnership dealings and transactions, for the purpose of obtaining a division of the profits (if any) among the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution

133 Knowles v. Haughton, 11 Ves. 168, as reported in Colly. Partn. (6th Ed.) 431, note.

134 See Blisset v. Daniel, 10 Hare, 493; Lindl. Partn. p. 498.

135 Lindl. Partn. 498.

136 4 Mylne & C. 619.

had not been asked, or because all the shareholders were not parties to the bill.[137]

But since Wallworth v. Holt other cases have been decided, in which bills praying for a division of the surplus assets among the shareholders, but not expressly praying for a dissolution, have been held good on demurrer.[138] The case which has gone furthest in this direction is Sheppard v. Oxenford;[139] for there every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked for. In Sheppard v. Oxenford a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property, and the sole director. Disputes having arisen, a bill was filed by a shareholder on behalf of himself and all the other shareholders, against the defendant, for an account of the moneys received and paid by him on behalf of the association, and for an account of its debts, and for their payment out of the available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of profits. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to the association, and to manage the affairs thereof, until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled;[140] and an injunction was granted, restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business; and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

137 See Richardson v. Hastings, 7 Beav. 323, 11 Beav. 17; Deeks v. Stanhope, 14 Sim. 57.

138 See Apperly v. Page, 1 Phil. Ch. 779; Wilson v. Stanhope, 2 Colly. 629; Cooper v. Webb, 15 Sim. 454; Clements v. Bowes, 17 Sim. 167.

139 1 Kay & J. 491.

140 See Sheppard v. Oxenford, 1 Kay & J. 491, 501.

Result of Latest Cases.

Having regard to the decisions in Sheppard v. Oxenford and other cases of a similar kind, it is conceived that the doctrine established in Wallworth v. Holt may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and profits among the persons entitled thereto. If this be so, the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away, at least as regards partnerships the members of which are too numerous to be made parties to the action.[141]

Agreements for Periodical Accountings.

An agreement between partners for a periodical accounting, or for the settlement of distinct transactions as they occur, may be enforced without a dissolution.[142] Thus, in the case of a partnership to deal in lands, where it was agreed that the proceeds of each sale should be divided at the time made, it was held that a division of the proceeds could be compelled without ordering the sale of other lands.[143]

Execution against One Partner's Interest.

Where the interest of a partner has been seized on execution or attachment by his individual creditor, a bill for an accounting to determine what, if any, interest such partner had, may be maintained without a dissolution. "Where the court is asked to order an account between partners, in order to determine whether, at the time of the attachment, the partner proceeded against at law by his creditor had any beneficial interest in the property attached, the same reason for refusal to proceed does not exist as in case of a suit between partners, where the object is to ascertain their relative rights, with a view to decreeing the payment of a balance by one to the other. The creditor attaches the interest of one partner as it

141 Lindl. Partn. p. 500. See Coville v. Gilman, 13 W. Va. 314.

142 Wadley v. Jones, 55 Ga. 329; Attorney General v. State Bank, 1 Dev. & B. Eq. (N. C.) 545. See, also, Denver v. Roane, 99 U. S. 355.

143 Patterson v. Ware, 10 Ala. 444.

exists at the time of the attachment. Subsequent changes in the relations of the partners inter sese, or in the rights of creditors, which are only substituted rights of the partners, are not necessary to be ascertained." [144]

SPECIFIC PERFORMANCE.

144. Subject to the rule that courts will not undertake the management of a going concern, specific performance of agreements between partners is governed by ordinary principles.

It has already been seen to what extent specific performance of agreements to form a partnership will be enforced.[145] Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a court is often requisite to compel those engaged in a going concern to act conformably to the articles of partnership, and also to compel those who have dissolved partnership to observe the stipulations into which they have entered. The principles on which the courts act in granting or withholding assistance, when sought for the former purpose, have already been considered; and, with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would, therefore, be foreign to the objects of the present treatise to prosecute this subject further; but, for purposes of reference, it may be useful to mention that the court has enforced the following agreements, entered into upon or with a view to a dissolution, namely, agreements not to carry on business within a certain distance or for a certain space of time; [146] agreements as to

[144] Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416.

[145] See ante, p. 75.

[146] Whittaker v. Howe, 3 Beav. 383; Turner v. Major, 3 Giff. 442. And see Coates v. Coates, 6 Madd. 287; Williams v. Williams, 1 Wils. Ch. 473, note.

the custody of partnership books, and the furnishing of copies thereof;[147] agreements that a third party, and he only, shall get in debts;[148] agreements that the value of the share of an outgoing or a deceased partner shall be ascertained in a specified way, and taken accordingly;[149] agreements that an outgoing partner shall offer his share to his co-partners before selling it to other persons;[150] agreements to grant an annuity to a retiring partner and his widow;[151] agreements not to divulge or make use of a trade secret.[152]

INJUNCTION.

145. The granting of an injunction to protect a partner's rights is governed by ordinary principles. It may be granted, although no dissolution of the partnership is sought.

Injunctions and Receivers.

In order to prevent a partner from acting contrary to the agreement into which he may have entered with his co-partners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his co-partner, it is sometimes necessary for a court to interfere, either by granting an injunction against the partner complained of, or by taking the affairs of the partnership out of the hands of all the partners, and intrusting them to a receiver of its own appointment. These two modes of interference require to be considered separately, for they are not had recourse to indiscriminately. The appointment of a

147 Lingen v. Simpson, 1 Sim. & S. 600. And see Whittaker v. Howe, 3 Beav. 383.

148 Davis v. Amer, 3 Drew. 64; Turner v. Major, 3 Giff. 442.

149 Morris v. Kearsley, 2 Younge & C. Exch. 139; Essex v. Essex, 20 Beav. 442; King v. Chuck, 17 Beav. 325. And see Featherstonhaugh v. Turner, 25 Beav. 382, and Gibson v. Goldsmid, 5 De Gex, M. & G. 757, reversing 18 Beav. 584. Cf. Downs v. Collins, 6 Hare, 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership; and Cooper v. Hood, 7 Wkly. Rep. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms.

150 Homfray v. Fothergill, L. R. 1 Eq. 567.

151 Aubin v. Holt, 2 Kay & J. 66; Page v. Cox, 10 Hare, 163.

152 Morison v. Moat, 9 Hare, 241.

receiver, it is true, always operates as an injunction, for the court will not suffer its officer to be interfered with by any one;[153] but it by no means follows that, because the court will not take the affairs of a partnership into its own hands, it will not restrain some one or more of the partners from doing what may be complained of.[154]

Injunction Granted though no Dissolution is Sought.

Whatever doubt there may have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought.[155] Indeed, injunctions are often granted for the very purpose of avoiding a dissolution. "Injunctions have been granted at the instance of one partner against his co-partner, both before and after dissolution, where necessary to restrain breaches of duty and prevent injury to the partnership affairs. While not every deviation from the partnership articles, or trifling violations of duty, will induce courts of equity to interfere, any substantial violation of the rights of the co-partnership authorizes courts of equity, in the exercise of sound discretion, to make use of this extraordinary remedy to prevent partners from doing mischief." [156]

153 See Helmore v. Smith, 35 Ch. Div. 449; Lindl. Partn. p. 538.

154 See Hall v. Hall, 3 Macn. & G. 79, 85; Rutland Marble Co. v. Ripley, 10 Wall. 339; Pirtle v. Penn, 3 Dana (Ky.) 247; Van Kuren v. Manufacturing Co., 13 N. J. Eq. 303; New v. Wright, 44 Miss. 202; Wilson v. Fitchter, 11 N. J. Eq. 71; Ballow v. Wood, 8 Cush. (Mass.) 48. An injunction will be granted to restrain one partner from using partnership property in a manner not authorized in the contract of partnership. New v. Wright, 44 Miss. 202. Generally, as to injunctions to protect rights after dissolution, see Wilkinson v. Tilden, 9 Fed. 683; Fletcher v. Vandusen, 52 Iowa, 448, 3 N. W. 488; Shannon v. Wright, 60 Md. 520; McGowan Bros. Pump & Mach. Co. v. McGowan, 22 Ohio St. 370.

155 Lindl. Partn. p. 539.

156 Lindl. Partn. (Wentw. Ed.) p. 539, note 1, citing Ballou v. Wood, supra; Stockdale v. Ullery, 37 Pa. St. 486; Marshall v. Johnson, 33 Ga. 500; Kean v. Johnson, 9 N. J. Eq. 401; Roberts v. McKee, 29 Ga. 161; Rutland Marble Co. v. Ripley, 10 Wall. 339.

Illustrations.

Partners may be enjoined from excluding their co-partner from the partnership business;[157] from using partnership property contrary to the partnership agreement;[158] from changing the fundamental nature of the partnership business;[159] from carrying on a competing business;[160] and injunctions have been granted in many other classes of cases.[161] Even where the partnership is at will, an injunction may be granted, but not, of course, where it would be valueless.[162]

Injunction in Action for Dissolution.

In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern. For example, one partner will be restrained from carrying on the concern for any other purpose than winding up;[163] from damaging the value of the good will, if it ought to be sold for the benefit of all;[164] from getting in the assets if he is likely to misapply them.[165] A surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner;[166] and they, on the other hand, will be

157 See Rutland Marble Co. v. Ripley, 10 Wall. 339; Pirtle v. Penn, 3 Dana (Ky.) 247; Wolbert v. Harris, 7 N. J. Eq. 605; Hall v. Hall, 12 Beav. 414; Petit v. Chevelier, 13 N. J. Eq. 181.

158 New v. Wright, 44 Miss. 202; Hall v. Hall, 12 Beav. 414.

159 Natusch v. Irving, 2 Coop. t. Cott. 358.

160 Marshall v. Johnson, 33 Ga. 500; Kemble v. Kean, 6 Sim. 333, 335.

161 See Glassington v. Thwaites, 1 Sim. & S. 124; Stockdale v. Ullery, 37 Pa. St. 486; Morris v. Colman, 18 Ves. 437; Levine v. Michel, 35 La. Ann. 1121; England v. Curling, 8 Beav. 129.

162 Lindl. Partn. p. 540. See Peacock v. Peacock, 16 Ves. 49; Miles v. Thomas, 9 Sim. 606.

163 See De Tastet v. Bordenave, Jac. 516; Wilson v. Fitchter, 11 N. J. Eq. 71; Marshall v. Watson, 25 Beav. 501; Charlton v. Poulter, 19 Ves. 148, note.

164 Turner v. Major, 3 Giff. 442; Bradbury v. Dickens, 27 Beav. 53. In the last case the defendant was advertising the discontinuance of a partnership periodical of which he was the editor.

165 O'Brien v. Cooke, Ir. R. 5 Eq. 51. There the plaintiff was allowed to get them in, indemnifying the defendant against costs, &c.

166 Elliot v. Brown, 3 Swanst. 489, note; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045.

restrained from making any improper use of partnership property, the legal estate of which may happen to be in them.[167] So a surviving partner will be restrained from disposing of or getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them.[168] Again, in an action for a dissolution, a partner will be restrained from improperly interfering with or obstructing the partnership business;[169] from drawing, accepting, or indorsing bills of exchange in the partnership name for other than partnership purposes;[170] from getting in debts owing to the firm;[171] from withholding the partnership books;[172] and, generally, on a dissolution, one partner will be restrained from injuring the property of the firm.[173]

Injunction to Protect Partners from the Representatives of a Co-partner.

So the court will interfere by injunction to protect partners from the interference of persons claiming the share of a late co-partner, by reason of his death or bankruptcy, or under an execution.[174]

Injunction to Enforce Special Agreements.

So, after a dissolution, the court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners,—such, for example, as agreements not to carry

167 Alder v. Fouracre, 3 Swanst. Ch. 489.

168 Hartz v. Schrader, 8 Ves. 317.

169 Smith v. Jeyes, 4 Beav. 503; Charlton v. Poulter, 19 Ves. 148, note.

170 Williams v. Bingley, 2 Vern. 278, note; Colly. Partn. 233; Jervis v. White, 7 Ves. 413; Hood v. Aston, 1 Russ. 412. In the two last cases, the injunction restrained malâ fide indorsees for value from parting with or negotiating the securities.

171 Read v. Bowers, 4 Brown Ch. 441.

172 Taylor v. Davis, 3 Beav. 388, note; Greatrex v. Greatrex, 1 De Gex & S. 692; Charlton v. Poulter, 19 Ves. 148, note.

173 See Marshall v. Watson, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm, was under special circumstances refused. See, also, as to making slanderous statements and diverting letters, Hermann Loog v. Bean, 26 Ch. Div. 306, a case of agency, but applicable to partnerships.

174 Philips v. Atkinson, 2 Brown, Ch. 272; Bevan v. Lewis, 1 Sim. 376; Allen v. Kilbre, 4 Madd. 464. See, also, ante, p. 141, "Execution against Partner's Share."

on business;[175] not to get in debts of the firm;[176] not to divulge a trade secret.[177] So, if a partner retires, and assigns his interest in the partnership and in the good will thereof to the continuing partners, he will be restrained from recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of or still connected with the old firm.[178]

Injunction in Case of Misconduct.

Before leaving this subject, it is necessary to make a few observations on the kind of misconduct which will induce the court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction;[179] but if one partner excludes his co-partner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the court will interfere for the protection of the other partners.[180] Where, however, the partner complained of has by agreement been constituted the active managing partner, the court will not interfere with him unless a strong case be made out against him;[181] nor will the court restrain a partner from acting as such merely because, if he is known so to do, the confidence placed in the firm by the public will be shaken.[182]

175 Whittaker v. Howe, 3 Beav. 383.

176 Davis v. Amer, 3 Drew, 64; Hartz v. Schrader, 8 Ves. 317; Ellis v. Commander, 1 Strob. Eq. (S. C.) 188.

177 Morison v. Moat, 9 Hare, 241; Roberts v. McKee, 29 Ga. 161.

178 Churton v. Douglas, Johns. Eng. Ch. 174.

179 See Marshall v. Colman, 2 Jac. & W. 266; Smith v. Jeyes, 4 Beav. 503; Lawson v. Morgan, 1 Price, 303; Cofton v. Horner, 5 Price, 537; Warder v. Stilwell, 3 Jur. (N. S.) 9.

180 In Anderson v. Wallace, 2 Moll. 540, one of several partners who horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

181 See Lawson v. Morgan, 1 Price, 303; Waters v. Taylor, 15 Ves. 10. See, also, Walker v. Hirsch, 27 Ch. Div. 460.

182 Anon, 2 Kay & J. 441.

Partner Applying for Injunction must Come with Clean Hands.

It need scarcely be observed that a partner who seeks an injunction against his co-partner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his co-partner from breaking;[183] and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct may have been.[184] As stated by Lord Eldon in Const v. Harris, a partner who complains that his co-partners do not do their duty to him must be ready at all times, and offer, to do his duty to them.[185]

Injunction to Restrain Holding Out.

In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a court will, it seems, interfere and restrain a person from holding out another as partner with him, without the authority of that other.[186]

RECEIVERS.

146. The appointment of a receiver of partnership property rests in the sound discretion of the chancellor. This discretion is exercised subject to the following general rules:

(a) A receiver will not be appointed unless a dissolution be sought, except

EXCEPTIONS—(1) Where a receiver is necessary to preserve the property until final hearing, and

(2) Where a decree can be made for carrying on the concern according to certain terms, which the parties themselves have agreed upon.

183 Smith v. Fromont, 2 Swanst. Ch. 330.

184 Littlewood v. Caldwell, 11 Price, 97, where an injunction was refused, because the plaintiff had taken away the partnership books. Marble Co. v. Ripley, 10 Wall. 339.

185 Const v. Harris, Turn. & R. 496, 524.

186 See Routh v. Webster, 10 Beav. 561; Bullock v. Chapman, 2 De Gex & S. 211; Lindl. Partn. 544.

(b) Before dissolution, a receiver will not be appointed, unless it appears that plaintiff will be entitled to a decree of dissolution, and that defendant has been guilty of improper conduct.

(c) Where a decree of dissolution has been entered on account of the improper conduct of the parties, a receiver will be appointed as a matter of course.

(d) After dissolution, a receiver will be appointed only where it appears either that a partner is misconducting himself, or that the assets are in peril.[187]

Principles on Which a Receiver is Appointed.

Where an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably to the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties.[188]

In granting or refusing an order for a receiver in partnership cases, the court does not act on the same principles on which it grants or refuses an order for an injunction. In granting a receiver of a partnership, the court takes the affairs of the partnership out of the hands of all the partners, and intrusts them to a receiver or manager of its own appointment. In granting an injunction, the court does not take the affairs of the partnership into its own hands, but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern. The

187 The text of this section is substantially reproduced from Kerr on Receivers.

188 Madgwick v. Wimble, 6 Beav. 495, 500; Blakeney v. Dufaur, 15 Beav. 40, 42. Equity has inherent jurisdiction to appoint a receiver independent of statute. Cox v. Volkert, 86 Mo. 505.

order for an injunction merely restrains one of the partners, who may have acted in breach of the partnership articles, or may have otherwise misconducted himself, from continuing to act in the way complained of.[189] It, therefore, does not follow that, because the court will grant an injunction, it will also appoint a receiver, or that, because it refuses to appoint a receiver, it will also decline to interfere by injunction.[190] In every case where complaints are made of breaches of articles, it must be seen whether they are urged with a view of making them the foundation of a dissolution, or of a decree enforcing and carrying on the partnership according to the original terms, and preventing, by proper means, those breaches recurring which have before happened by reason of the conduct of the parties.[191]

Receiver not Appointed Unless a Dissolution be Sought.

It is not according to the practice of the court, where it is not the object of the suit to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, to grant, in the course of that suit, the appointment of a receiver.[192] The court does not interfere with the management of a partnership, except as incidental to the object of the suit,—to wind up the concern and divide the assets.[193] If the court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the kingdom.[194]

Same—Exceptions.

Cases, however, may arise in which a partner was so conducting himself that, unless a receiver was appointed before the hearing, the partnership concern might in the meantime be destroyed. In such

189 See Hall v. Hall, 3 Macn. & G. 79, 86.

190 Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79; Read v. Bowers, 4 Brown, Ch. 441; Hartz v. Schrader, 8 Ves. 317. See, also, Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Low v. Holmes, 17 N. J. Eq. 148.

191 Hall v. Hall, supra; Goodman v. Whitcomb, 1 Jac. & W. 589, 593.

192 Goodman v. Whitcomb, supra; Hall v. Hall, supra; Roberts v. Eberhardt, Kay, 148. Disagreements between partners, insufficient as a ground for dissolution, are not sufficient to sustain the appointment of a receiver. Sloan v. Moore, 37 Pa. St. 217; McElvey v. Lewis, 76 N. Y. 373.

193 Waters v. Taylor, 15 Ves. 10, 13.

194 Goodman v. Whitcomb, 1 Jac. & W. 589, 592; Roberts v. Eberhardt, Kay, 148.

case the court would appoint an interim receiver.[195] A receiver would also, there is no reason to doubt, be appointed, although the dissolution of the partnership were not sought, in a case where the question was one of the receipt of money only, and where, if the money were allowed to be received by the parties, it would not be applied to its proper purposes, and thus, at the hearing, there would be a failure of justice, unless the court interposed in the meantime.[196] In Const v. Harris,[197] Lord Eldon said that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to the terms of some specific instrument, which, by the agreement of the parties, was to regulate the mode of its being carried on, as well as in a suit for wholly putting an end to the concern; and a receiver was appointed in that case, although a dissolution was not sought by the bill. The case itself was a peculiar one. The proprietors of a theater had executed a deed by which they covenanted and agreed that the profits of the theater should be exclusively appropriated to particular purposes, and that the treasurer, for the time being, should be irrevocably directed so to apply the profits. Some years afterwards the parties entitled to seven-eighths of the theater entered into an agreement which provided in some respects for a different application of the profits, and otherwise affecting the rights of a party interested in the remaining one-eighth, who was not consulted on the subject; and, upon the application of that party for the specific performance of the covenants and agreements of the original deed, a receiver was appointed. The receiver was a receiver wholly unconnected with the management. His office was purely a ministerial one. He was to receive all that persons paid for their entrance to the theater, and to apply it according to certain terms and provisions which the parties themselves had agreed on.[198]

Necessity of Prayer for Dissolution.

It is not necessary, in order to induce the court to appoint a receiver, that the bill should expressly pray for a dissolution. It is enough that it be plain that it is necessary to put an end to the concern.[199] If such be the case, the case stands upon precisely the

195 Hall v. Hall, supra. 196 Hall v. Hall, supra. 197 Turn. & R. 496, 517.
198 Kerr, Rec. p. 81; Hall v. Hall, 3 Macn. & G. 90.
199 Wallworth v. Holt, 4 Mylne & C. 619.

same basis as if the bill had been filed exclusively for the purpose of the dissolution, and the winding up of the concern.[200] The court will in all cases entertain an application for a receiver if the object of the suit is to wind up the partnership affairs, and the appointment of a receiver is sought with that view.[201]

The mere fact that the bill may pray a dissolution is not a sufficient ground for the appointment of a receiver, unless a state of facts is shown upon the bill as will, if proved at the hearing, entitle the plaintiff to a decree for dissolution.[202] The court will not, upon motion, appoint a receiver, unless it sees that there is an actual present dissolution, arising from the acts of the parties, or that, at the hearing, it will dissolve the partnership. If there has been no misconduct, or no such violation of the articles as to entitle the plaintiff to a dissolution, a receiver will not be appointed.[203] If, however, the court sees its way to a dissolution at the hearing, there is a case for a receiver.[204]

Receiver not Ordered in Every Case Where a Case for Dissolution is Made.

The court will not, as a matter of course, appoint a receiver of the partnership assets even where a case for dissolution is made.[205] The very basis of a partnership contract being the mutual confidence

200 Hall v. Hall, 3 Macn. & G. 89.

201 Sheppard v. Oxenford, 1 Kay & J. 491; Hubbard v. Curtis, 8 Clarke (Iowa) 1; Saylor v. Mockbie, 9 With. (Iowa) 209; Evans v. Coventry, 5 De Gex, M. & G. 911.

202 Goodman v. Whitcomb, 1 Jac. & W. 589; Roberts v. Eberhardt, Kay, 148; Smith v. Jeyes, 4 Beav. 503.

203 Baxter v. West, 28 Law J. Ch. 169.

204 Marsden v. Kaye, 30 Law T. 197; Gowan v. Jeffries, 2 Ashm. 296. If the case made stands in such a state that the court cannot see whether or not there shall be a decree for dissolution at the hearing, it will not take into its own hands the conduct of a partnership, although it may be dissolved. Goodman v. Whitcomb, 1 Jac. & W. 592. See, also, as to appointment on interlocutory application, Baxter v. West, 28 Law J. Ch. 169; at the hearing, Id., 1 Drew & G. 173, 175; Waters v. Taylor, 15 Ves. 25; Bailey v. Ford, 13 Sim. 495; Bowker v. Henry, 6 Law T. (N. S.) 43.

205 Harding v. Glover, 18 Ves. 281; Fairburn v. Pearson, 2 Macn. & G. 145; Slemmer's Appeal, 58 Pa. St. 168; Waters v. Taylor, 15 Ves. 10; Cox v. Peters, 13 N. J. Eq. 39; Renton v. Chaplain, 9 N. J. Eq. 62; Quinlivan v. English, 44 Mo. 46.

reposed in each other by the parties,[206] the court will not appoint a receiver in a suit between members of the partnership firm unless some special ground for its interference be established.[207] It must appear that the member of the firm against whom the appointment of a receiver is sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties.[208]

[206] Philips v. Atkinson, 2 Brown, Ch. 272. See Peacock v. Peacock, 16 Ves. 51; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385.

[207] Harding v. Glover, 18 Ves. 281. See, also, Slemmer's Appeal, 58 Pa. St. 168; Tomlinson v. Ward, 2 Conn. 396; Terrell v. Goddard, 18 Ga. 664; Parkhurst v. Muir, 7 N. J. Eq. 307.

[208] Kerr, Rec. p. 90; Smith v. Jeyes, 4 Beav. 505; Peacock v. Peacock, 16 Ves. 51; Chapman v. Beach, 1 Jac. & W. 594, note. In Williamson v. Wilson, 1 Bland (Md.) 418, 426, the court said: "These parties admit themselves to be insolvent debtors. The plaintiff charges his co-partners, the defendants, with a design to waste the joint property and apply it to their own use. The defendants deny these allegations, and charge the plaintiff with a design to misapply the funds, and to give some of the creditors an undue preference. Taking the charges of the plaintiff and of the defendants, or of either party, to be true, or allow that each, or either party, was about to waste the property, or has his favorite creditors, to whom it is his design to give an undue preference, and it is clear that one, or the other, or both of them, have formed a fixed resolution to violate one of the great principles of equity, which it is the peculiar province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have as yet obtained any legal advantage. It is proper, therefore, that this court should now lay its hands upon the joint property of this partnership, and let all its creditors come in pari passu, and according as their respective priorities, if any, should appear. Both parties profess to have had this equitable distribution in contemplation. Both acknowledge themselves to be in that insolvent condition in which the making of such an equitable distribution has devolved upon them as a duty. And yet each charges the other with having made an effort and formed a fixed design to disregard this duty. Neither of them seems to have the least confidence in the other. Under all these circumstances, I consider this as a case in which it is peculiarly fit and proper that a receiver should have been appointed before answer, and should now be continued as a means of winding up the affairs of this partnership in safety, and with justice and equality to all concerned." A dissolution of a partnership may be granted, and a receiver appointed, on account of the gross misconduct of one or more of the parties. To authorize the appointment of a receiver there must be some breach of the duty of the partner or the contract of partnership. New v. Wright, 44 Miss. 202. See, also, Marble Co. v. Ripley, 10 Wall. 339; Drew v. Beard, 107 Mass. 64; Wilson v. Fitchter, 11 N. J.

Death or Bankruptcy of One Member of a Firm not a Ground for a Receiver.

The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a receiver as against the surviving or solvent partner or partners. The mutual confidence

Eq. 71; Shannon v. Wright, 60 Md. 520; Cox v. Volkert, 86 Mo. 505; Stockdale v. Ullery, 37 Pa. St. 486; Fairthorne v. Weston, 3 Hare, 387. Upon a bill between partners for closing the affairs of a partnership after the dissolution of the firm, the insolvency of the defendant will entitle the complainant to the appointment of a receiver and an injunction. Randall v. Morrell, 17 N. J. Eq. 343. In this case the court said (page 346): "In the courts of New York and elsewhere it has been adopted as an established rule that, on a bill for closing the affairs of a partnership, when it is admitted that the firm has been dissolved, the appointment of a receiver follows as a matter of course. [Citing Law v. Ford, 2 Paige (N. Y.) 310; Marten v. Van Schaick, 4 Paige (N. Y.) 479.] It is true that this course of decision has not been followed with exact conformity in this state, but the principle has been adopted, subject to the important qualification that, even after a dissolution, a receiver will be appointed only when it appears necessary to protect the interests of the parties. The rule in this restricted (and, as it seems to me, highly reasonable) form, will be found propounded and is elucidated in the cases of Kenton v. Chaplain, 9 N. J. Eq. 62; Birdsall v. Colie, 10 N. J. Eq. 63; Cox v. Peters, 13 N. J. Eq. 41. But that the circumstance of the insolvency of one of the partners, in addition to the fact of the dissolution of the firm, would, under ordinary circumstances, induce this court to assume the administration of the partnership affairs, I think, admits of no doubt; and it seems equally clear that, when the court proceeds on this consideration, an injunction is an almost indispensable auxiliary to a receiver. The insecurity of the assets if left under the power of an insolvent member of a dissolved firm, is the motive, in such case, upon which the judicial action is based; and it applies with equal force to the allowance of an injunction as to the appointment of a receiver. It is only by the united efficacy of these two safeguards that, when insolvency supervenes, the assets of the co-partnership can be secured and preserved for the benefit of those to whom they equitably belong." In Wilson v. Fitchter, 11 N. J. Eq. 71, the court said: "Because one partner filing a bill may be entitled, as of course, to a decree for dissolution, and for an injunction, so far as to prevent the other partner from carrying on business in the partnership name, and on the credit of the partnership, it does not follow, of course, that a receiver is to be appointed. That is a matter somewhat in the discretion of the court. It is true, in Law v. Ford, 2 Paige (N. Y.) 310, and in Marten v. Van Schaick, 4 Paige (N. Y.) 479, the chancellor states it to be a matter of course. But I have had occasion before to approve what was said by Lord Eldon in Harding v. Glover, 18 Ves. 281, disavowing, as a principle of this court, that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of the duty

which the members of the firm reposed in each other at the date of the contract, and which formed the very basis of the partnership contract, is not, as regards the surviving or solvent partner or partners, affected by the death or insolvency of one of the members of the firm.[209] If a partner dies or becomes bankrupt, a right to wind up the partnership concern, and collect the assets, is by law vested in the surviving [210] or solvent [211] partner or partners, as the case may be. Before the court will interfere and appoint a receiver, some breach or neglect of duty on their part must be established.[212]

of a partner, or of the contract of partnership, to justify such appointment. * * * Where the answer denies the partnership, the court will not interfere with the property in dispute." Where a partnership is not determinable at will, and the court is resorted to for the purpose, a receiver will be appointed of course. The reason is that whatever justifies the court in decreeing a dissolution establishes the propriety of appointing a receiver. But where a partnership is dissolved by mutual consent, or determined by the will of either party, the appointment of a receiver is not a matter of course. "Many a solvent partnership would terminate in insolvency if its affairs were suddenly committed to the hands of a stranger." Birdsall v. Colie, 10 N. J. Eq. 63, 65. "A receiver of a partnership may be appointed, pending a suit for dissolution, where it appears that complainant is probably entitled to the dissolution, and the partners cannot agree among themselves as to the disposition and control of the firm property." Fetter, Eq. p. 332; McElvey v. Lewis, 76 N. Y. 373; Jordan v. Miller, 75 Va. 442; New v. Wright, 44 Miss. 202; Allen v. Hawley, 6 Fla. 164; Barnes v. Jones, 91 Ind. 161. In O'Bryan v. Gibbons, 2 Md. Ch. 9, it was held that, where a partnership still subsists, to authorize either party to apply for an injunction, and for the appointment of a receiver, he must be prepared to show a case of great abuse or strong misconduct, and the query was suggested that the bill should likewise ask for dissolution. After dissolution, it was said that the objection to an injunction and the appointment of a receiver was not so strong, but that, to induce the court to act, some urgent and pressing necessity must be shown. See, to same effect, Drury v. Roberts, 2 Md. Ch. 157; Heflebower v. Buck, 64 Md. 15, 20 Atl. 991; Morey v. Grant, 48 Mich. 326, 12 N. W. 202.

209 See Philips v. Atkinson, 2 Brown, Ch. 272.

210 Collins v. Young, 1 Macq. 385. See Philips v. Atkinson, 2 Brown, Ch. 272. See, also, post, p. 408.

211 Freeland v. Stansfeld, 2 Smale & Giff. 479, 487; Fraser v. Kershaw, 2 Kay & J. 496, 499. See, also, post, p. 410.

212 Collins v. Young, 1 Macq. 385; Horrell v. Witts, L. R. 1 Prob. & Div. 103; Renton v. Chaplain, 9 N. J. Eq 62; Walker v. House, 4 Md. Ch. 39, 45; Hamill v. Hamill, 27 Md. 679. "It is consequently a matter of course to appoint a receiver when all the partners are dead and a suit is pending between their rep-

Misconduct of Partner a Ground for a Receiver.

The ground on which the court is most commonly asked to appoint a receiver is where, by the misconduct of a partner, his right of personal intervention in the partnership affairs has been forfeited, and the partnership funds are in danger of being lost. Mere quarrels and disagreements between the partners, arising from infirmities of temper, are not a sufficient ground for the interference of the court.[213] The due winding up of the affairs of the concern must be endangered to induce the court to appoint a receiver.[214] The non-co-operation of one partner, whereby the whole responsibility of management is thrown on his co-partner, is not sufficient.[215] Where, however, a partner has so misconducted himself as to show that

resentatives." Kerr, Rec. p. 94; Philips v. Atkinson, 2 Brown, Ch. 272. So, also, when such appointment is sought by a partner against the representatives or assignees in bankruptcy of his late co-partner. Freeland v. Stansfeld, 16 Jur. 792, 2 Smale & Giff. 479. See, also, Fraser v. Kershaw, 2 Kay & J. 496. Where there is an unreasonable delay on the part of the surviving partners in closing the affairs of the partnership, or if they are wasting the partnership assets, a receiver will be appointed, on the application of the administrator of the deceased partner. Miller v. Jones, 39 Ill. 54. See, also, Holden's Adm'rs v. M'Makin, 1 Pars. Eq. Cas. (Pa.) 270; Shannon v. Wright, 60 Md. 520. When one partner, who is insolvent, or in failing circumstances, without the consent and against the will of the other partner, is disposing of the effects of the partnership, and appropriating them to his own use, the other has a right to an injunction, and to have a receiver appointed. Phillips v. Trezevant, 67 N. C. 370. After dissolution of the firm, whether by mutual agreement or by the death of one of its members, a receiver will be appointed, where it appears that the partners in possession are misconducting themselves, or that the assets are in peril. Word v. Word, 90 Ala. 81, 7 South. 412; Buskin v. Boyce, 104 Ind. 53, 3 N. E. 615; Davis v. Grove, 2 Rob. (N. Y.) 134, 635.

[213] Goodman v. Whitcomb, 1 Jac. & W. 589, 593; Marshall v. Colman, 2 Jac. & W. 266; Smith v. Jeyes, 4 Beav. 503, 504; McElvey v. Lewis, 76 N. Y. 373; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Sloan v. Moore, 37 Pa. St. 217; Loomis v. McKenzie, 31 Iowa, 425. And see Kennedy v. Kennedy, 3 Dana (Ky.) 239.

[214] Goodman v. Whitcomb, 1 Jac. & W. 589, 593; Smith v. Jeyes, 4 Beav. 503, 505. Where each partner attempts separately to make an assignment of the partnership assets for the benefit of creditors to separate assignees, each of whom notifies the firm debtors not to pay the amount owing the firm to the other, the appointment of a receiver for the partnership is proper. Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952.

[215] Roberts v. Eberhardt, Kay, 148; Rowe v. Wood, 2 Jac. & W. 556; Smith v. Lowe, 1 Edw. Ch. 33.

he is no longer to be trusted,—as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts,[216] or is carrying on a separate trade on his own account with the partnership property;[217] or if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner;[218] or where, the partnership property being abroad, one of the partners goes off in order to do what he likes with it;[219] or if the persons having the control of the partnership assets have already made away with some of them;[220] or if there has been such mismanagement as to endanger the whole concern;[221] or if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract,[222]—in all such cases a receiver will be appointed.

The unwillingness of the court to appoint a receiver at the suit of one member of a firm against another being based on the confidence originally reposed in each other by the parties, the ground of the rule has no longer any place if it appear that the confidence has been misplaced.[223] Where, accordingly, a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards, on discovering the fraud, filed a bill praying that the partnership might be declared void, and for a receiver, the court, on motion, ordered that a receiver should be appointed.[224]

There is a case for a receiver, even although there be no misconduct endangering the partnership assets, if one partner excludes

216 Estwick v. Conningsby, 1 Vern. 118.

217 Harding v. Glover, 18 Ves. 281.

218 Madgwick v. Wimble, 6 Beav. 495. See Crawshay v. Maule, 1 Swanst. 507; Miller v. Jones, 39 Ill. 54; Holden's Adm'rs v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270.

219 Sheppard v. Oxenford, 1 Kay & J. 491.

220 Evans v. Coventry, 5 De Gex, M. & G. 911.

221 See De Tastet v. Bordieu, cited 2 Brown, Ch. 272; Jefferys v. Smith, 1 Jac. & W. 298; Hall v. Hall, 3 Macn. & G. 79.

222 Smith v. Jeyes, 4 Beav. 505; Saylor v. Mockbie. 9 Withr. (Iowa) 209. See, generally, Boyce v. Burchard, 21 Ga. 74; Sutro v. Wagner, 23 N. J. Eq. 388; Evans v. Evans, 9 Paige (N. Y.) 178; Jacquin v. Buisson, 11 How. Prac. (N. Y.) 385; Haight v. Burr, 19 Md. 130; Maher v. Bull, 44 Ill. 97.

223 See Chapman v. Beach, 1 Jac. & W. 594, note; Smith v. Jeyes, 4 Beav. 503.

224 Ex parte Broome, 1 Rose, 69.

another partner from the management of the partnership affairs.[225] This doctrine is acted on where the defendant contends that the plaintiff is not a partner,[226] or that he has no interest in the partnership assets. In Hale v. Hale,[227] where the defendant sought to exclude the plaintiff from all interest in the partnership assets, and relied on illegality as a defense to the suit, a receiver was appointed. In that case the plaintiff and defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that he, being a spiritual person, was not competent by law to engage in any trading concern, and claimed the whole property himself. A receiver and manager was appointed on the ground that the defendant insisted on a legal objection, as destroying all right of his co-partner to a share in the profits, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.[228]

Inasmuch as the court will not appoint a receiver against a partner unless some special ground for doing so can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver operating in fact as an injunction against the members,

[225] Wilson v. Greenwood, 1 Swanst. 481; Goodman v. Whitcomb, 1 Jac. & W. 592; Rowe v. Wood, 2 Jac. & W. 558; Const v. Harris, Turn. & R. 525; Katz v. Brewington, 71 Md. 79, 20 Atl. 139 (cf. Kershaw v. Matthews, 2 Russ. 62); Hottenstein v. Conrad, 9 Kan. 435; Shulte v. Hoffman, 18 Tex. 678; Barnes v. Jones, 91 Ind. 161; Heathcot v. Ravenscroft, 6 N. J. Eq. 113. In Maynard v. Railey, 2 Nev. 313, it was held that a receiver would be appointed where one partner excludes his co-partner from the participation in the affairs of the partnership, or when both partners have assigned their respective interests, and the assignees cannot agree. In Marten v. Van Schaick, 4 Paige, 479, Chancellor Walworth says: "Each partner has an equal right in this case to the possession and control of the partnership effects in business, and, if they cannot agree among themselves, it is a matter of course to appoint a receiver, upon a bill filed to close the partnership concerns, on the application of either party." See, also, Van Rensselaer v. Emery, 9 How. Prac. 135; McElvey v. Lewis, 76 N. Y. 373; Richards v. Baurman, 65 N. C. 162; Sloan v. Moore, 37 Pa. St. 217.

[226] Peacock v. Peacock, 16 Ves. 49; Blakeney v. Dufaur, 15 Beav. 40.

[227] 4 Beav. 369.

[228] See, also, Sheppard v. Oxenford, 1 Kay & J. 491, 492, where a receiver was appointed although the legality of the partnership was denied.

there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by a receiver.[229]

Course of Court Where the Partnership is Denied.

Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined.[230]

Receiver Appointed Where Partners have, by Agreement, Divested Themselves of the Right of Winding Up.

Another case in which the court may be called upon to appoint a receiver is where the partners have, by agreement, divested themselves more or less of their right to wind up the affairs of the concern. In Davis v. Amer,[231] for instance, the plaintiff and defendant, on dissolving partnership, appointed a third person to get in the assets of the partnership, and agreed not to interfere with him. After the agreement had been partially acted on, one of the partners died; and, disputes arising between the executors of the deceased partner and the surviving partner, the latter got in some of the debts of the firm, in violation of the agreement. On a bill filed by the executors of the deceased partner for an injunction and a receiver, the court, on motion, appointed a receiver, but declined to grant an injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary.[232]

229 Kerr, Rec. 98; Hall v. Hall, 3 Macn. & G. 79.

230 Kerr, Rec. p. 98; Peacock v. Peacock, 16 Ves. 49; Chapman v. Beach, 1 Jac. & W. 594, note; Fairburn v. Pearson, 2 Macn. & G. 144; Norway v. Rowe, 19 Ves. 144; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; Hobart v. Ballard, 31 Iowa, 521; Guyton v. Flack, 7 Md. 398; Speights v. Peters, 9 Gill (Md.) 472. A receiver will not be appointed in a proceeding to dissolve a partnership where the partnership is denied, unless the court is satisfied that there is in fact a partnership between the parties, or that the fund is in danger. McCarty v. Stanwix, 16 Misc. Rep. 132, 38 N. Y. Supp. 820.

231 3 Drew. 64.

232 Kerr, Rec. p. 99. See, also, Turner v. Major, 3 Giff. 442. When both partners have assigned their respective interests, and the assignees cannot agree, a receiver will be appointed. Maynard v. Railey, 2 Nev. 313.

CHAPTER VIII.

ACTIONS BETWEEN PARTNERS AND THIRD PERSONS.

147. In General.
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160–162. Retirement of Old Member.
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164–167. Bankruptcy and Insolvency.
168. Disqualification of One Partner to Sue.
169. Action in Firm Name.

IN GENERAL.

147. Actions between partners and third persons are in the main governed by ordinary principles. The chief peculiarities relate

(a) To parties, and

(b) To actions where one partner is disqualified to sue.

PARTIES TO ACTION ON FIRM CLAIM.

148. It is a general rule that all partners must join as parties plaintiff in an action to enforce a partnership claim. This will be considered under the following heads:

(a) Claims arising ex contractu (p. 363).

(b) Claims arising ex delicto (p. 371).

SAME—CLAIMS ARISING EX CONTRACTU.

149. The question as to parties plaintiff in actions on partnership claims arising ex contractu arises in two classes of cases:

(a) Where the contract was made in the name of the firm (p. 363), **and**

(b) Where the contract was made in the name of one partner on behalf of the firm (p. 365).

150. CONTRACTS IN FIRM NAME—Actions upon contracts made in the firm name must be brought in name of all the persons who were actual partners at the time the contract was made, except

EXCEPTIONS—(a) Dormant partners are proper but not necessary parties (p. 363).

(b) Nominal partners need not be made parties unless expressly named in the contract (p. 364).

It has been seen that the firm, as an entity, does not exist in contemplation of law, and that the firm name is merely a convenient symbol to indicate all the partners jointly.[1] A contract made in the partnership name is, therefore, a contract made with all the partners jointly, and it is familiar law that in such a case, all the persons with whom the contract was made must join in an action to enforce it.[2] The effect of changes in the firm, as by the admission of a new member, or the retirement of an old one, will be considered hereafter.[3]

Dormant Partners.

In partnership transactions, dormant partners occupy the position of undisclosed principals. They may, therefore, join as plaintiffs in

[1] See ante, p. 98.

[2] Seely v. Schenck, 2 N. J. Law, 71; Reed v. Railroad Co., 105 Mass. 303; Choteau v. Raitt, 20 Ohio, 132; Vinal v. Land Co., 110 U. S. 215, 4 Sup. Ct. 4; Cushing v. Marston, 12 Cush. Mass. 431; Moore v. Burns, 60 Ala. 269; Fish v. Gates, 133 Mass. 441. As partners cannot be sued otherwise than in their individual names, the allegation of a partnership name need not be proven, but may be regarded as surplusage. Courson v. Parker, 39 W. Va. 521, 20 S. E. 583.

[3] See post, p. 378.

an action on a contract entered into on behalf of the firm of which they are members. But dormant partners never need be joined as plaintiffs in such an action. The action may be brought by the ostensible partners alone, for they are the persons with whom the contract was expressly made. In other words, dormant partners are proper, but not necessary, parties.[4]

Nominal Partners.

A nominal partner is a person who appears to be a partner, but is not so. He sometimes must, and sometimes need not, join in an action on a contract made with the firm.[5]

First. If a contract is made expressly with a real and with a nominal partner, they must join in suing on it.[6] Thus, if a nominal partner's name is on a bill of exchange or promissory note, he must be a party to the action brought upon it; and the same rule applies to actions on contracts under seal.[7]

Secondly. Prima facie, a nominal partner ought to join in suing on any contract, whether express or implied, made with the firm; for an agreement with the firm is, prima facie, an agreement with the persons who apparently make up the firm. But, if it be distinctly shown that a person who is apparently the member of a firm is in reality not so,—i. e. that he is merely a nominal partner,—a contract made with the firm is not in reality made with him, and he need not join in suing upon it.[8]

Thirdly. It is an open question whether a nominal partner can join in cases in which it has been established that there is no necessity for his joining. As a misjoinder is a much less serious error than a nonjoinder of plaintiffs, a nominal partner should, as a matter of prudence, join in all actions on contracts made with the firm.[9]

[4] Wood v. O'Kelley, 8 Cush. (Mass.) 406; Hilliker v. Loop, 5 Vt. 116; Platt v. Halen, 23 Wend. (N. Y.) 456; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53; Desha v. Holland, 12 Ala. 513; Monroe v. Ezzell, 11 Ala. 603. See Seymour v. Railroad Co., 106 U. S. 320, 1 Sup. Ct. 123; Secor v. Keller, 4 Duer (N. Y.) 416; Howe v. Savory, 51 N. Y. 631, 49 Barb. (N. Y.) 403.

[5] Dicey, Parties, p. 172.

[6] Guidon v. Robson, 2 Camp. 302. Cf. Teed v. Elworthy, 14 East, 210.

[7] Guidon v. Robson, 2 Camp, 302.

[8] Cf. Teed v. Elworthy, 14 East, 210, with Kell v. Nainby, 10 Barn. & C. 20. See Bates, Partn. § 1023.

[9] Dicey, Parties, p. 172. See, in affirmative, Colly. Partn. 467. See, in nega-

151. CONTRACTS IN NAME OF PARTNER—Actions on contracts made in the name of one partner, but on behalf of the firm, must be brought by all the members jointly who composed the firm at the time the contract was made, except

EXCEPTIONS—(a) In the following cases the action must be brought in the name of the contracting partner alone:

(1) Where the contract is under seal (p. 366).

(2) Where the contract is a negotiable instrument (p. 366).

(3) Where the right to sue on the contract is by the terms or circumstances of it expressly restricted to the partner with whom it is made (p. 367).

(b) In the following cases the action may be brought either in the name of all the partners, or in the name of the partner in whose name it was made:

(1) Where the contract is made with the partner personally, as well as with him on behalf of the firm (p. 368).

(2) Where the partner is the only known or ostensible principal; that is, where the firm occupies the position of an undisclosed principal (p. 369).

(3) Where the partner has paid away money of the firm under circumstances which give a right to recover it back (p. 369).

(c) Dormant partners are proper, but not necessary, parties (p. 370).

Each partner is an agent of his co-partners within the scope of the partnership business. Hence, he must sue alone on contracts made with the firm (his principals) in cases in which an action must be brought in the name of an agent. The question whether a part-

tive, Lindl. Partn. (2d Ed.) 479. Cf. Bond v. Pittard, 3 Mees. & W. 357. And see Kell v. Nainby, 10 Barn. & C. 20; Harrison v. Fitzhenry, 3 Esp. 238; Enix v. Hays, 48 Iowa, 86; Bishop v. Hall, 9 Gray (Mass.) 430.

ner may or must sue without joining his co-partners is in reality nothing but the inquiry whether an agent must or may sue on a contract made with him on behalf of his principal.[10] Accordingly, where it expressly appears from the contract that it was entered into on behalf of a firm, an action thereon must be brought by all the members composing the firm at the time the contract is entered into,[11] excepting only dormant partners.[12] So, where the action is on an implied contract with the firm, all the partners must join as plaintiffs, whether the defendant knew he was dealing with the firm or not. Thus, if the funds of a firm are lent by one partner, he cannot alone maintain an action for its repayment by virtue of any implied contract with himself, for the promise to repay which is implied by law is a promise with the real lenders of the money, and must be sued upon by them.[13]

When Partner must Sue Alone—Sealed Instruments.

Where a contract under seal is entered into with one partner only, he alone can sue upon it. If it is entered into with more than one, all those with whom it was expressly entered into must sue jointly, and no others can.[14]

Same—Negotiable Instruments.

No person can claim upon a bill of exchange or promissory note except the parties named in the instrument. Hence, though the party named in such instrument is a partner, the action must be brought in his name alone, and not jointly in the name of himself and his co-partners, who are not parties.[15] This exception appears

[10] Dicey, Parties, p. 153.

[11] Badger v. Daenicke, 56 Wis. 678, 14 N. W. 821; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53.

[12] See ante, p. 364, note 4; Lebeck v. Shaftoe, 2 Esp. 468.

[13] Colly. Partn. p. 1012, note, citing Garrett v. Handley, 3 Barn. & C. 462; Graham v. Robertson, 2 Term R. 282; Teed v. Elworthy, 14 East, 210. In an action by partners on a contract made by defendant with one of plaintiffs only, plaintiffs need not prove that defendant understood that they were partners. Philpott v. Bechtel, 104 Mich. 79, 62 N. W. 174.

[14] See Dicey, Parties, pp. 153, 134, 101; Metcalfe v. Rycroft, 6 Maule & S. 75; Colly. Partn. p. 1010, note, citing note to Cabell v. Vaughan, 1 Saund. 291i; Scott v. Godwin, 1 Bos. & P. 67. A partner, being a tenant in common with his co-partner, may recover possession of the whole of the firm real estate, as against one holding the same without title. Brady v. Kreuger (S. D.) 66 N. W. 1083.

[15] Dicey, Parties, pp. 153, 134; Bowden v. Howell, 3 Man. & G. 638; Driver v.

to be of small importance, since the right to sue on such instruments is assignable. If they be indorsed in blank, any persons holding them may sue upon them. Where a partner is named as a party to a negotiable instrument, he may indorse it to his firm, and thereupon an action may be maintained by all the partners jointly.[16]

Same—Contract with Partner Alone.

It may be that, though a partner is acting for his firm, the person with whom he deals expressly refuses to contract with any other than the partner himself, or it may be manifest, from the circumstances of the case, that the contract was with the partner personally, and with him alone. In such a case, though the partner may have been, as a matter of fact, acting for his firm, and the firm as his principal may have rights against such partner, yet the firm has no rights against a person with whom the partner dealt, but who never contracted with the firm, and the partner, who is the only person with whom he did contract, is the only one who can sue him upon the contract.[17] Thus, where a contract was made with one of sev-

Burton, 17 Q. B. 989; Mynderse v. Snook, 53 Barb. (N. Y.) 234, 1 Laws (N. Y.) 488.

[16] See Bates, Partn. § 1017.

[17] Where the third person has clearly expressed his intention to deal with the agent as principal, or where he has dealt with the agent on terms of trust and confidence, or the nature of the contract is fiduciary, the undisclosed principal cannot claim the benefits of the contract. "Every man has a right to elect what parties he will deal with. * * * And, as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury." Winchester v. Howard, 97 Mass. 303. The intention to deal only with the agent may be found in the recitals of the written contract, Humble v. Hunter, 12 Q. B. 310; or the negotiations attending an oral one, Winchester v. Howard, supra. In the first case, the question would be one of construction for the court; in the latter, of fact for the jury. The intention may be further inferred from the nature of the contract, as where it is fiduciary, or for personal skill or service. Pol. Cont. (6th Ed.) p. 67; Eggleston v. Boardman, 37 Mich. 14. But in the latter case it would seem that, if the agent has personally discharged the trust or performed the service, his undisclosed principal may recover the compensation. Warder v. White, 14 Ill. App. 50, citing Grojan v. Wade, 2 Starkie, 443; Huff. Ag. § 132. Where a landlord, knowing that his store is wanted by a firm of four persons in which to carry on their business, makes a lease to one of them, and two of the others sign as sureties, and the other is in no way a party to the lease, only the one named as lessee can sue for breach of the lease. Burwitz v. Jeffers, 103 Mich. 512, 61 N. W. 784.

eral partners in his individual capacity, and he at the time declared that he alone was interested in it, it was held that the other partners, although they might be interested in it, could not sue upon it;[18] for, though the partner might, as regards his fellow partners, act as their agent, yet "if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made."[19] So, if one contracts with an agent, in consideration of the known personal capabilities of the agent, he cannot be made liable to the principal for whom the agent was acting.[20]

This exception contains the principle which governs all the exceptional cases in which a partner must sue alone for a breach of contract. The reason of this peculiarity always is that the other contracting party has contracted with the partner alone. That the contract was made with him alone may appear by the form of the contract itself (e. g. where it is by deed), or it may be proved from the circumstances of the case. But the reason why the partner alone can sue will be found to be in every instance the same, viz. that, as between him and the other party to the contract, he has contracted, not as an agent, but as sole principal.[21]

When Partner may Sue Either Alone or Jointly with Co-partners.

"Where an agent makes a contract, stating who his principal is, the principal, and not the agent, is the person generally the party to the contract, if the agent have the authority he alleges. But, on the other hand, an agent may, and often does, make himself personally a party to the contract, if the form of the contract be such as to amount to saying, 'Although I am an agent only, nevertheless I contract for myself'; and, although the principal may in some cases

[18] Lucas v. Delacour, 1 Maule & S. 249. "Where, in a written instrument, the agent has represented himself in express terms or recitals as the real and only principal, the undisclosed principal cannot maintain an action in his own name, since parol evidence would be inadmissible to vary the express terms and recitals of the written instrument. Humble v. Hunter, 12 Q. B. 310; Schmaltz v. Avery, 16 Q. B. 655; Darrow v. Produce Co., 57 Fed. 463." Huff. Ag. § 133.

[19] Id.

[20] Robson v. Drummond, 2 Barn. & Adol. 303.

[21] See Dicey, Parties, p. 136.

take advantage of such a contract, the agent, being the contracting party is clearly liable, and can therefore sue upon it." [22]

Same—Firm as an Undisclosed Principal.

"It is a well-established rule of law that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. The rule is most frequently acted upon in sales by factors, agents, or partners, in which case either the nominal or the real plaintiff may sue; but it may be equally applied to other cases." [23]

Same—Recovery of Money Paid under Fraud or Mistake.

"If an agent pays money for his principal, by mistake or otherwise, which he ought not to have paid, the agent, as well as the principal, may maintain an action to recover it back." [24] There is no reason why this rule should not apply to payments made by one partner for his firm, and it has been held that where a partner enters into a contract under seal for the payment of money, and the money is paid out of funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money.[25]

Same—Reason and Limitation of Rule.

The right to bring the suit either in the name of the partner with whom the contract was made, or in the name of all the partners jointly, rests on the ground that, while the partners collectively—i. e. the firm—have the ordinary right of every principal to sue for the breach of a contract made on their behalf, the agent has been dealt with as a party, though not the only party, to the contract, or to the transaction which gives a right of action as if there had been a breach of contract; e. g. where the partner sues for money of the

22 Fisher v. Marsh, 34 Law J. Q. B. 178, per Blackburn, J. Cf. Hilliker v. Loop, 5 Vt. 116.

23 Sims v. Bond, 5 Barn. & Adol. 393, per curiam.

24 Story, Ag. § 398.

25 Lefevre v. Boyle, 3 Barn. & Adol. 877.

firm which he was wrongfully induced to pay.[26] The choice or election of suing either in the name of the agent partner, or all the partners jointly, is subject to certain limitations, the object of which is to prevent this right of election from being so exercised as to work injustice to any of the persons concerned in the contract.

First. The partner's right to sue is subject to the firm's right to interpose. Wherever the principal, as well as the agent, has a right to maintain a suit upon any contract made by the latter, he may generally supersede the right of the agent to sue by suing in his own name.[27] So, the principal may, by his own intervention, intercept or suspend or extinguish the rights of the agent under the contract, as if he makes other arrangements with the other contracting party, or waives his claims under it, or receives payment thereof, or in any other manner discharges it. This, indeed, results from the general principle of law that every man may waive or extinguish rights the benefit whereof exclusively belongs to himself, and that whatever rights are acquired by an agent are acquired for his principal.[28]

Secondly. Where an undisclosed principal sues on a contract made with his agent, "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party";[29] that is, the defendant may avail himself of all defenses which would have been available to him against the agent at the time of the disclosure, had that agent been really a principal.[30]

Dormant and Nominal Partners.

When the contract is made in the name of one partner, but under circumstances entitling the firm—i. e. all the partners jointly—to sue, the same considerations as to dormant and nominal partners apply as in the case of contracts made in the firm name.[31]

[26] Dicey, Parties, p. 140.

[27] Sadler v. Leigh, 4 Camp. 195.

[28] Story, Ag. § 403.

[29] Sims v. Bond, 5 Barn. & Adol. 393, per curiam.

[30] Thomson v. Davenport, 9 Barn. & C. 78, 2 Smith, Lead. Cas. (7th Ed.) 359.

[31] See ante, p. 363.

SAME—CLAIMS ARISING EX DELICTO.

152. In an action ex delicto to recover damages suffered by partners jointly, i. e., damages to the firm, all the partners must join as plaintiffs.

Where the same act that causes a damage to all the partners jointly as a firm also causes a separate and personal damage to one or more of the partners, two or more causes of action exist. The joint damage must be recovered in a joint action by all the partners, and the individual damage must be recovered in separate actions by each.

With respect to actions by partners not founded on any breach of contract, or of quasi contract, but on some tort, the general principle is that, where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it,[32] while, on the other hand, several persons ought not to join in an action ex delicto, unless they can show a joint damage.[33]

These doctrines are well illustrated by actions for libel. A libel on a firm can be made the subject of an action by the firm.[34] If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz. one by the party libeled, and the other by him and his co-partners; but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libeled partner only.[35] If one partner is libeled, and the firm cannot be shown to have been damnified, an action for

[32] See 1 Wm. Saund. 291m; Addison v. Overend, 6 Term R. 766; Sedgworth v. Overend, 7 Term R. 279.

[33] 2 Wm. Saund. 116a; Noonan v. Orton, 32 Wis. 106; Donnell v. Jones, 13 Ala. 490; Medbury v. Watson, 6 Metc. (Mass.) 246; Robinson v. Mansfield, 13 Pick. (Mass.) 139; Trott v. Irish, 1 Allen (Mass.) 481. Cf. Duffy v. Gray, 52 Mo. 528.

[34] See Cooke v. Batchelor, 3 Bos. & P. 150; Forster v. Lawson, 3 Bing. 452; Williams v. Beaumont, 10 Bing. 260; Metropolitan Saloon Omnibus Co. v. Hawkins, 4 Hurl. & N. 87; Taylor v. Church, 1 E. D. Smith (N. Y.) 279; Duffy v. Gray, 52 Mo. 528; Donnell v. Jones, 13 Ala. 490.

[35] See Harrison v. Bevington, 8 Car. & P. 708; Forster v. Lawson, 3 Bing. 452; 2 Wm. Saund. 117b; Haythorn v. Lawson, 3 Car. & P. 196; Duffy v. Gray, 52 Mo. 528; Donnell v. Jones, 13 Ala. 490; Noonan v. Orton, 32 Wis. 106; Davis v. Ruff, 1 Cheves (S. C.) 17.

the libel should be brought in the name of the individual partner aggrieved, and not by the firm;[36] and he may sue alone, although the libel more particularly affects him in the way of his business.[37] Moreover, a general statement not clearly pointing to any particular person, but libelous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals.[38]

PARTIES TO ACTION ON FIRM LIABILITY.

153. This subject will be treated under the following heads:

(a) **Liabilities arising ex contractu** (p. 372).

(b) **Liabilities arising ex delicto** (p. 378).

SAME—LIABILITIES ARISING EX CONTRACTU.

154. All persons who are partners at the time when a contract is made by or on behalf of the firm must be joined as defendants in an action for its breach, except

EXCEPTIONS—(a) **Dormant partners are proper, but not necessary, parties** (374).

(b) **Nominal partners are not necessary parties, but are proper parties in cases where they have been held out under such circumstances as to render them liable as actual partners** (p. 375).

(c) **Where the contract has been made in the name of one partner, he alone can be sued in the following cases:**

(1) **Where the contract is under seal** (p. 375).

(2) **Where the contract is a negotiable instrument** (p. 376).

(3) **Where credit was given exclusively to the partner in whose name the contract was made** (p. 376).

[36] Solomons v. Medex, 1 Starkie, 191.

[37] Harrison v. Bevington, 8 Car. & P. 708; Robinson v. Marchant, 7 Q. B. 918.

[38] Le Fanu v. Malcolmson, 1 H. L. Cas. 637.

(d) **Where the contract has been made in the name of one partner, an action thereon may be maintained either against such partner alone or against all the partners jointly in the following cases:**

(1) **Where the partner contracted individually, as well as on behalf of the firm** (p. 376).

(2) **Where the contract does not show that it was entered into on behalf of the firm; that is, where the firm occupies the position of undisclosed principal** (p. 377).

As has been seen, contracts with a firm are simply contracts with all the partners jointly. All persons who are jointly liable on a contract must, as a general rule, be joined in an action thereon. Where a contract, therefore, is made by or on behalf of a firm, as where it is made in the firm name, all the persons who were partners at the time it was made must, as a general rule, be joined as defendants. The partnership name is merely a symbol to designate all the partners, without naming them, and to show that the contract was a partnership transaction. But, even where the contract was entered into by an agent, or by one partner, if it appears from the contract that it was a contract with the firm, then all the partners must be joined, because they are joint principals.[39]

[39] Page v. Brant, 18 Ill. 37; Pettis v. Atkins, 60 Ill. 454; Curtis v. Hollingshead, 14 N. J. Law, 402; Simonds v. Speed, 6 Rich. Law, 290; Lippincott v. Carriage Co., 25 Fed. 577. Nonjoinder of all the partners can only be taken advantage of by plea in abatement. Sinsheimer v. Manufacturing Co., 54 Ill. App. 151; Puschel v. Hoover, 16 Ill. 340; Mershon v. Hobensack, 22 N. J. Law, 372; Smith v. Cooke, 31 Md. 174. In an action against the members of the firm of R. & Co. on a contract made in the firm name by defendant R., it appeared that when the contract was made the other defendants were not R.'s partners, and who were his partners then did not appear. Held, that the complaint must be dismissed as to all the defendants, including R. Hand v. Rogers (City Ct. N. Y.) 35 N. Y. Supp. 712, affirmed 25 Civ. Proc. R. 254, 16 Misc. Rep. 17, 37 N. Y. Supp. 657. Where all the partners are sued on a partnership debt, and the action is barred as to one, he not having been made a party at the commencement of the action, no recovery can be had against the others. Fish v. Farwell, 54 Ill. App. 457. In an action against the members of a voluntary association, upon a contract, the recovery must be against all or none. Pettis v. Atkins, 60 Ill. 454. In Kent v. Holliday, 17 Md. 387, it was held that in an action on a partnership contract all those who were partners at the

Dormant Partners.

It has been seen that dormant and secret partners are liable on all contracts entered into on behalf of the firm to which they belong; and, whether such a contract is written or parol, express or implied, it is clear that they may be sued upon it. But it is perfectly proper not to join them. A person who holds himself out to another as the only person with whom that other is dealing cannot afterwards say that such other was also dealing with somebody else. In short, dormant partners are proper, but not necessary, parties.[40]

time of the contract ought to be joined as defendants, for such a contract is a joint contract; and that a declaration which discloses that there was a joint contractor at the time the contract sued on is made, and does not aver he was dead, or a nonresident of the county, or account in any other way for his not being joined in the action, is bad on demurrer. Every co-partnership is required to file with the town clerk in New Hampshire, and with the prothonotary of the county in Pennsylvania, a certificate of the names and residences of all the partners, or no suits against them will be abated for nonjoinder. NEW HAMPSHIRE: Pub. St. 1891, c. 121, §§ 1, 2. PENNSYLVANIA: Pepper & L. Dig. 1894, "Partnership," §§ 1, 2. Where two or more persons are bound by contract, judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, and including the parties of negotiable papers, upon orders and checks and sureties on the same or separated instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. IOWA: McClain's Code 1888, § 3755. MINNESOTA: Gen. St. 1894, § 5166. KANSAS: Gen. St. 1889, par. 1101. KENTUCKY: St. 1894, § 476. TENNESSEE: Mill. & V. Code 1884, § 3484. MISSOURI: Rev. St. 1889, § 1995. SOUTH CAROLINA: Code Civ. Proc. 1893, § 141. NEW MEXICO: Comp. Laws 1884, § 1885. DISTRICT OF COLUMBIA: Rev. St. 1873, § 827. An action or judgment against one or more persons jointly bound is not in several states a bar to proceedings against the others. VERMONT: V. S. 1894, § 1182. IOWA: McClain's Code 1888, § 3755. KENTUCKY: St. 1894, § 477. NEW MEXICO: Comp. Laws 1884, § 1885. DISTRICT OF COLUMBIA: Rev. St. 1873, § 827. So, in all cases of joint obligations or joint assumptions of co-partners and others, suits may be brought against any one or more of those liable. MISSOURI: Rev. St. 1889, § 2387. NEW MEXICO: Comp. Laws 1884, § 1846. Judiciary Act, c. 13, § 18, providing that no judgment, without complete satisfaction, against a part only of the defendants in an action upon a joint contract, shall be a bar to a future action against such defendants as were not served in the first action, impliedly allows an action against partners, who both reside out of the state, to proceed against one of them upon whom the writ is served while temporarily in the state. Nathanson v. Spitz (R. I.) 31 Atl. 690.

[40] New York Dry Dock Co. v. Treadwell, 19 Wend. (N. Y.) 525; Leslie v.

Nominal Partners.

Nominal partners are not actual partners. As has been seen, their liability on firm contracts rests on estoppel, and not on the fact that they are actual parties to it.[41] A plaintiff, in an action on a firm contract, may therefore waive the benefit of the estoppel, and sue only the actual partners, or he may join the nominal partner, as he sees fit. In other words, nominal partners are not necessary parties, but are proper parties, in cases where they have been held out under such circumstances as to render them liable as actual partners.[42]

When Agent-Partner must be Sued Alone—Deeds.

Where a partner contracts by deed in his own name, he alone can be sued thereon. This is a mere application of the rule that

Wiley, 47 N. Y. 648; Scott v. Conway, 58 N. Y. 619; North v. Bloss, 30 N. Y. 374; Wright v. Herrick, 125 Mass. 154; Page v. Brant, 18 Ill. 37; Cox v. Hickman, 8 H. L. Cas. 268; Cleveland v. Woodward, 15 Vt. 302; De Mautort v. Saunders, 1 Barn. & Adol. 398; Chase v. Deming, 42 N. H. 274; Dicey, Parties, p. 368.

[41] See ante, p. 96.

[42] Hatch v. Wood, 43 N. H. 633; Scarf v. Jardine, 7 App. Cas. 345. "But, where the nominal partner has never been known as such to a particular person, it would rather appear (see, contra, Young v. Axtell, cited Waugh v. Carver, 2 H. Bl. 235, 1 Smith, Lead. Cas. [6th Ed.] 846, where it is stated by Lord Mansfield 'that as the defendant had suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at her time of dealing know that she was a partner, or that her name was used.' Id. 847) that such person cannot join him in an action against the firm, for the rule which imposes on a nominal partner the responsibilities of a real one is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm. But, where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies. Waugh v. Carver, 1 Smith, Lead. Cas. (6th Ed.) 860. A plaintiff's right to sue a nominal partner depends upon its being proved 'that the defendant held himself out, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner.' Dickinson v. Valpy, 10 Barn. & C. 140, per Parke, J. And compare Shott v. Strealfield, 1 Moody & R. 9; Alderson v. Popes, 1 Camp. 404, note. The rule as to a nominal partner's liability to be sued may, if this view of his position be correct, be thus summed up: He is simply an apparent partner, and may be sued by any person to whom he appears to be a partner, but cannot be sued by any person to whom he has not appeared to be a partner." Dicey, Parties, p. 270.

the person to be sued on a contract by deed is the person with whom the contract is expressed by the deed to be made.[43]

Same—Negotiable Instruments.

Where a partner draws, indorses, or accepts a bill of exchange in his own name, he alone can be sued thereon. Though "the rule of law, as to simple contracts in writing other than bills and notes, is that parol evidence is admissible to charge unnamed principals, * * * but is inadmissible for the purpose of discharging the agent who signs, as if he were principal, in his own name, * * * yet it is conceived that the law as to negotiable instruments is different in one respect, to wit, that where the principal's name does not appear he is not liable on a bill or note as a party to the instrument." [44]

Same—Credit Given Exclusively to Agent-Partner.

It is possible that a third party, with whom a partner contracts as an agent, on behalf of his firm as a known principal, may be willing to give credit to the agent partner, and not be willing to give credit to the firm or principal. A person so dealing with an agent cannot afterwards sue the principal.[45] "If the principal be known to the seller at the time when he makes the contract, and he, with the full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal." [46]

When Partner may be Sued Alone or Jointly with Co-partners.

Where a partner contracts individually, as well as on behalf of his firm, the action may be brought either against him alone or against all the partners jointly. "A person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The differ-

[43] Dicey, Parties, pp. 271, 229, rule 48; Eastwood v. Bain, 3 Hurl. & N. 738; Bottomley v. Nuttall, 5 C. B. (N. S.) 122, 28 Law J. C. P. 110; Appleton v. Binks, 5 East, 147, 148; Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139.

[44] Byles, Bills (8th Ed.) 34, 35. See Pentz v. Stanton, 10 Wend. (N. Y.) 271; Leadbitter v. Farrow, 5 Maule & S. 345. Cf. Lindus v. Bradwell, 5 C. B. 583, 17 Law J. C. P. 121.

[45] Addison v. Gandasequi, 4 Taunt. 573, 2 Smith, Lead. Cas. (8th Ed.) 392.

[46] Thomson v. Davenport, 9 Barn. & C. 78, 2 Smith, Lead. Cas. (8th Ed.) 398.

ence is that, if the contract is by word of mouth, it is not possible to say, from the agent using the words 'I' and 'me'; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is that binds himself personally, and, accordingly, he is taken to do so. * * * It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes himself the contracting party."[47] If the contract is by parol, it is merely a question of evidence whether the partner intended to bind himself personally. If the contract is in writing, it is a question of interpretation. Thus, where an agent contracts in his own name, without mentioning his principal, though the fact of his being an agent is known to the other party, he is personally liable.[48] The fact, however, that an agent is clearly liable on a written contract, does not free his principal from liability; for, though a person who appears to be liable on the face of a written contract cannot give evidence to show that he is not liable, since to do this would be to contradict the written contract, there is nothing to prevent the production of evidence that a person who is not liable on the face of a contract is in reality chargeable under it.[49]

Same—Firm as Undisclosed Principal.

Where a partner contracts in his own name, but in reality for his firm, which occupies the position of an undisclosed principal, either the partner so contracting or the firm—i. e. all the partners jointly—may be sued.[50] This exception might be included under the last.

47 Williamson v. Barton, 31 Law J. Exch. 174, per Bramwell, B. See, also, Dicey, Parties, 255; Story, Ag. § 269; Higgins v. Senior, 8 Mees. & W. 834; Parker v. Winlow, 7 El. & Bl. 942. Cf. Fisher v. Marsh, 34 Law J. Q. B. 177, 6 Best & S. 411.

48 Higgins v. Senior, 8 Mees. & W. 834.

49 Dicey, Parties, p. 256; Paterson v. Gandasequi, 15 East, 62, 2 Smith, Lead. Cas. (6th Ed.) 613.

50 See Dicey, Parties, 256; Paterson v. Gandasequi, supra. Where one assumes to act as agent for a single member of a firm in the sale of partnership property, the receipt by the assumed principal of the money received on the sale is a ratification of the agency, and an adoption of the means by which it was obtained. And, when the purchaser was ignorant of the existence of the partnership, the other partners need not be joined in an action to recover back the money paid, for fraud

SAME—LIABILITIES ARISING EX DELICTO.

155. One or any or all of the partners in a firm may be sued separately or jointly for a wrong committed by the firm.

Actions of Tort against Partners.

It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly;[51] but, supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants;[52] and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself.[53] But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land; for all joint tenants or tenants in common ought to be joined in an action for an injury arising from the state of their land, and this rule applies to partners as well as to persons who are not partners.[54]

EFFECT OF CHANGES IN FIRM.

156. Changes in the membership of a firm may arise by

(a) The admission of a new member (p. 379).

(b) The retirement of an old member (p. 381).

(c) The death of a member (p. 384).

(d) The bankruptcy or insolvency of a member (p. 385).

on the part of the agent, or for mistake. The declared principal becomes liable immediately upon the receipt of the money, and his subsequent division of it among persons who were strangers in the transaction to the plaintiff cannot affect his liability. Leslie v. Wiley, 47 N. Y. 648.

[51] See Hale, Torts, p. 167.

[52] Sutton v. Clarke, 6 Taunt. 29; Hale, Torts, p. 123; Lindl. Partn. p. 283.

[53] Mitchell v. Tarbutt, 5 Term R. 649; Ansell v. Waterhouse, 6 Maule & S. 385; Wood v. Luscomb, 23 Wis. 287; Howe v. Shaw, 56 Me. 291.

[54] Lindl. Partn. 283; Mitchell v. Tarbutt, 5 Term R. 649.

SAME—ADMISSION OF NEW MEMBER.

157. Where a new member has been taken into a firm, he cannot join as plaintiff in actions on claims due the old firm, except

EXCEPTIONS—(a) Where the claim has been assigned to the new firm (p. 380).

(b) Where, by consent of all the parties, the new firm is substituted for the old as the obligee (p. 380).

158. Where a new member has been taken into a firm, he cannot be joined as a defendant in an action on a liability of the old firm, except

EXCEPTIONS—(a) Where, by consent of all parties, the new firm is substituted as the obligor (p. 381).

(b) Where the incoming partner has become liable to creditors by assuming debts of the old firm, he may be joined or sued separately, according as his liability is joint or several[55] (p. 381).

159. Where the circumstances are not such that the new partner can sue or be sued, as the case may be, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.

The admission of a new member into a firm, as has been repeatedly said, operates as the formation of a new firm, and the dissolution of the old one. In other words, prima facie, the new partner is admitted for the future, and not for the past. The claims due the old firm belong to the members of the old firm, and are to be enforced by them. Similarly, a new member cannot be sued on a liability of the old firm. The liabilities, like the claims of the old firm, belong to the old members. There are, however, certain exceptions or apparent exceptions to these rules; and, under certain circumstances, the incoming partner may sue or be sued as the case may be. But, where the circumstances are not such that the

[55] See ante, p. 245.

new partner can sue or be sued, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.[56]

Exceptions—When New Member may Join as Plaintiff.

The first exception to the rule that a new member cannot sue on a claim due the old firm is where there has been an assignment of such claims by the old firm to the new. Assignees of choses in action are now almost universally allowed to sue thereon in their own names.[57]

The second exception is where, by consent of all the parties interested, the new firm is substituted for the old as the obligee. This exception differs from the first as a novation differs from an assignment, viz. by the consent of the creditor, the discharge of the old obligation, and the creation of a new one. In such a case the new member may of course join, but the exception is only an apparent one, for the action is on the obligation to the new firm, and not on the obligation to the old one.[58]

[56] Lindl. Partn. p. 286; Wilsford v. Wood, 1 Esp. 183; Vere v. Ashby, 10 Barn. & C. 288; Young v. Hunter, 4 Taunt. 582; Hatchett v. Blanton, 72 Ala. 423; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Bracken v. Dillon, 64 Ga. 243. An incoming partner is not liable on a written agreement of employment for more than a year, made before his entry into the firm, and signed in the firm name only. Hughes v. Gross (Mass.) 43 N. E. 1031.

[57] See Viles v. Bangs, 36 Wis. 131; Walker v. Steel, 9 Colo. 388, 12 Pac. 423. For cases illustrating the common-law rule see Howell v. Reynolds, 12 Ala. 128; Molen v. Orr, 44 Ark. 486.

[58] See ante, p. 252. "In all these cases, founded on a new and original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to recovery." Farley v. Cleveland, 4 Cow. (N. Y.) 439, approved in Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322. The new member having covenanted, as between himself and the retiring partner, to pay the latter's share of the partnership liabilities, and the new firm having made payments on the plaintiff's claim, and the retiring partner having assigned to plaintiff all claim he might have against such new member on the agreement between them, and the plaintiff having thereupon brought this suit against the new firm, these facts, appearing in evidence, would be sufficient to fairly warrant a jury in finding that plaintiff had accepted the new firm as her debtor in place of the old, and had consented to the substitution which the several partners among themselves had agreed upon. Creditors of a dissolved firm, who take the paper of the succeeding firm, release the retiring members. Smith v. Shelden, 35 Mich. 42;

Same—When New Member may be Made a Defendant—Assumption of Debts.

The first exception to the rule that a new member cannot be sued on an obligation of the old firm is where, by consent of all the parties interested, the new firm is substituted as the obligor. This exception to the rule as to defendants corresponds to the similar exception as to plaintiffs, just considered. It is only an apparent exception, for the action is really on an obligation of the new firm, the obligation of the old firm being discharged in consideration of the assumption of liability by the new firm.

There is a second exception in some jurisdictions to the rule under consideration. As has been seen, a number of courts hold that an incoming partner, by assuming debts of the old firm, may become liable to creditors, although he has not contracted with them, and although the old firm has not been released. In these jurisdictions, where the incoming partner has become liable to creditors by assuming debts of the old firm, he may be joined or sued separately, according as his liability is joint or several.[59]

SAME—RETIREMENT OF OLD MEMBER.

160. A retired partner must join as a plaintiff in actions on claims due the old firm whenever such joinder would have been necessary had he not retired, except

EXCEPTIONS—(a) Where the claim has been assigned to the new firm.

(b) Where, by consent of all the parties, the new firm is substituted for the old as obligee.

Regester v. Dodge, 19 Blatchf. 79, 6 Fed. 6; Dodd v. Dreyfus, 57 How. Prac. (N. Y.) 319. But such subrogation of the new firm must be accepted by the creditor, to release the retiring member. Hayes v. Knox, 41 Mich. 529, 2 N. W. 670; Osborn v. Osborn, 36 Mich. 48.

[59] See ante, p. 252. If a new firm, formed from an old firm by the retirement of a member, succeeds to and continues the business of the old firm in the same place, slight evidence is sufficient to warrant the inference that it has assumed the liabilities of the old firm; and, if it has assumed such liabilities, a partner has the same right to give partnership notes in payment of them as he has to give such notes in payment of the debts of the new firm. Shaw v. McGregory, 105 Mass. 96.

161. A retired partner must be joined as a defendant in an action on a liability of the old firm whenever such joinder would have been necessary had he not retired, except

EXCEPTIONS—(a) Where, by consent of all the parties, the new firm is substituted for the old as the obligor.

(b) Where the new firm has become liable to creditors by assuming debts of the old firm.

162. Where the circumstances are not such that the retired partner may be omitted, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.

Much the same considerations apply to the case of the retirement of an old member as do to the case of the admission of a new one. The change operates equally as the dissolution of the old firm and the formation of a new one. The general rule is that a retired partner must join as plaintiff or defendant whenever such joinder would have been necessary had he not retired. The exceptions to this rule are practically the converse of the exceptions to the rule as to incoming partners. Thus, where the claim has been assigned to the new firm, or where, by consent of all the parties concerned, the new firm is substituted for the old as obligee, the retired partner should not join as plaintiff. Under similar circumstances, it has been seen that an incoming partner should join. So, where, by consent of all concerned, the new firm is substituted for the old as obligor, and where the new firm has become liable to creditors by assuming debts of the old firm, the action may be against the new firm, omitting the retired partner. Where the circumstances are not such that the retired partner may be omitted, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.[60]

[60] Lindl. Partn. p. 286; Dobbin v. Foster, 1 Car. & K. 323. See, also, ante, p. 379. Where one member of an insolvent firm sells his interest with the agreement that the new firm shall assume the debts of the old, the assets of the new firm are charged in equity with a trust for the payment of the debts of the old, which may be enforced by a creditor of the old firm who has not consented to accept the

When Change in Firm Discharges Contract.

Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already mentioned, confer upon the partners any new right of action against strangers, or vice versa, as regards what may have occurred before the change took place, it may, nevertheless, operate so as to discharge a person from a contract previously entered into by him. Thus, a person who is surety to a firm is discharged from his suretyship, for the future, by a change among its members, and cannot therefore be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change.[61] Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by Robson v. Drummond.[62] In that case A. and B. were partners as coachmakers. C., who knew nothing of B., entered into a contract with A. for the hire of a carriage for five years, at so much a year, and A. undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A. and B. dissolved partnership, and A. assigned the carriage and the benefit of the contract relating to it to B. B. gave C. notice of the dissolution and arrangement respecting the carriage; but C. declined to continue the contract with B., and returned the carriage. An action was then brought by A. and B. against C., for not performing the contract; but it was held that the action would not lie, the contract having been with A. alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part. In Stevens v. Benning,[63] the same principle was applied to a contract

new firm as his creditor instead of the old. Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007.

61 See ante, p. 269.

62 2 Barn. & Adol. 303. Cf. British Waggon Co. v. Lea, 5 Q. B. Div. 149.

63 1 Kay & J. 168, 6 De Gex, M. & G. 223. See Hole v. Bradbury, 12 Ch. Div. 886.

between an author and a firm of publishers; and it was held that the contract was one of a personal character, and that, consequently, the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.

SAME—DEATH OF MEMBER.

163. After the death of a member, actions on partnership claims or obligations must be brought by or against the surviving partners, and ultimately the last survivor or his representatives.

Where a partner dies, all actions in respect of any contract entered into by or on behalf of the firm before his death must be brought by or against the surviving members of the firm, and by or against them alone. The representatives of the deceased partner can neither sue nor be sued at law in respect of any such contract.[64] So, an action for the conversion of partnership goods must be brought by the surviving partners.[65] It follows that the last surviving partner, or, if he be dead, his legal personal representative, is the proper person to sue and be sued at law in respect of the debts and engagements of the firm.[66] "These rules, however,

[64] Lindl. Partn. p. 289; Dixon v. Hamond, 2 Barn. & Ald. 310; Martin v. Crompe, 1 Ld. Raym. 340, 2 Salk. 444. See Buckley v. Barber, 6 Exch. 164, 178. The administrator of a deceased partner cannot be joined with the surviving partners, as a defendant, in an action on the obligations of the firm. Childs v. Hyde, 10 Iowa, 294.

[65] Kemp v. Andrews, Carth. 170. But see Buckley v. Barber, 6 Exch. 164.

[66] Dicey, Parties, p. 274, rule 58; Lindl. Partn. p. 289; Richards v. Heather, 1 Barn. & Ald. 29; Calder v. Rutherford, 3 Brod. & B. 302. "A joint contract is made by X., Y., and Z. The liability to be sued upon the contract passes, on the death of Z., to X. and Y.; on the subsequent death of Y., to X.; and, on the death of X. (provided the liability to be sued survives), to X.'s executor or administrator. The representatives, e. g. of Z., can neither be sued upon the contract themselves, nor be sued jointly with X. and Y. A person's separate liability on any contract passes, of course, to his representatives. If, therefore, X., Y., and Z. enter into a joint and several contract, and Z. die, X. and Y. may be sued on their joint contract, and Z.'s executor may be sued on Z.'s separate contract. In other words, a joint and several contract by X. and Y. is, in effect, three contracts,—a joint con-

can be no longer relied upon, except where the obligation sought to be enforced is joint in equity, as well as at law. Wherever it is several as well as joint, an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner." [67]

On the death pendente lite of a partner plaintiff, the action proceeds without amendment upon the mere suggestion of the death; and so, in case of the death of a partner defendant pendente lite, the liability survives against the survivors, and no revivor is necessary.[68]

SAME—BANKRUPTCY AND INSOLVENCY.

164. Actions on firm claims must be brought

(a) On the insolvency of the firm, by the trustee of the bankrupts.

(b) On the bankruptcy of one or more partners, by the solvent partners, together with the trustee or trustees of the bankrupt partner or partners.

165. Mere bankruptcy or insolvency of a firm or its members does not, previous to their discharge, affect their liability on firm obligations.

166. After discharge of the firm in bankruptcy, no action can be maintained against the partners on previous obligations of the firm.

167. After the discharge of one or more partners in bankruptcy, the action must be brought against the solvent partner or partners.

tract by X. and Y., a separate contract by X., and a separate contract by Y." Dicey, Parties, p. 238.

[67] Lindl. Partn. p. 288. See, also, Doggett v. Dill, 108 Ill. 560; Nelson v. Hill, 5 How. (U. S.) 127; Blair v. Wood, 108 Pa. St. 278; Camp v. Grant, 21 Conn. 41; Manning v. Williams, 2 Mich. 105; Pape v. Cole, 55 N. Y. 124; Sherman v. Kreul, 42 Wis. 33; Pearson v. Keedy, 6 B. Mon. (Ky.) 128; Pullen v. Whitfield, 55 Ga. 174.

[68] Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 South. 108; Gaines v. Beirne, 3 Ala. 114; Troy Iron & Nail Factory v. Winslow, 11 Blatchf. 513, Fed. Cas. No. 14,199; Townes v. Birchett, 12 Leigh (Va.) 173; Bowen v. Mill Co., 31 Iowa, 460; Childs

Where a partnership makes an assignment for the benefit of creditors, or is forced into bankruptcy, the partnership is dissolved, and its affairs must be wound up. In such case the assignee or trustee is the person to bring actions on firm claims.[69] Where one or more partners become bankrupt or make an assignment for the benefit of creditors of all their property, including their interest in the partnership, the firm is likewise dissolved; and actions on firm claims should thereafter be brought by the solvent partners, together with the trustee or trustees of the bankrupt partner or partners.[70] In such case the assignee or trustee becomes a tenant in common with the solvent partner of all the partnership property.[71] The mere assignment or bankruptcy of a firm or its members does not, however, affect their liability on firm obligations. They continue liable and may be sued until such obligations are discharged.[72] After discharge of the firm in bankruptcy, no action can be maintained against the partners on previous obligations of the firm, unless they are such as cannot be discharged in bankruptcy.[73] After the discharge of one or more partners in bankruptcy, the action must be brought against the solvent partner or partners.[74] "There is no remedy by action against a trustee in respect of the bankrupt whom he represents. The remedy is by proof against the bankrupt's estate."[75]

v. Hyde, 10 Iowa, 294; Dunman v. Coleman, 59 Tex. 199. See, also, Sherman v. Kreul, 42 Wis. 33; Cragin v. Gardner, 64 Mich. 399, 31 N. W. 206.

[69] Lindl. Partn. p. 289. See Ray v. Davies, 8 Taunt. 134; Stonehouse v. De Silva, 3 Camp. 399; Hancock v. Haywood, 3 Term R. 433.

[70] Eckhardt v. Wilson, 8 Term R. 140; Thomason v. Frere, 10 East, 418; Graham v. Robertson, 2 Term R. 282; Heilbut v. Nevill, L. R. 4 C. P. 354. If the assignees decline to join, the solvent partners were entitled to make use of their names upon indemnifying them against the costs of the action. Lindl. Partn. p. 289; Whitehead v. Hughes, 2 Cromp. & M. 318; Ex parte Owen, 13 Q. B. Div. 113. An assignment of one partner's estate under the insolvent laws does not prevent all the partners from maintaining an action previously commenced on a debt due to the partnership. Cunningham v. Munroe, 15 Gray (Mass.) 471.

[71] Dicey, Parties, p. 160.

[72] Lindl. Partn. p. 289.

[73] Dicey, Parties, p. 273.

[74] Lindl. Partn. p. 290; Dicey, Parties, p. 273; Hawkins v. Ramsbottom, 6 Taunt. 179.

[75] Dicey, Parties, p. 273.

DISQUALIFICATION OF ONE PARTNER TO SUE.

168. In cases where all the partners must join as plaintiffs to enforce a firm claim, if one of the partners is disqualified to sue, no action at law can be maintained.

It has been seen that all the partners must join in an action on an obligation to a firm because it is in law an obligation to all the partners jointly.[76] Whenever, therefore, one partner is disqualified to sue upon a cause of action, no action can be maintained at law either by all the partners jointly, because by hypothesis one is disqualified, or by the other partners, because all must join.[77] The rule already discussed that no action at law lies upon a claim by a firm against one of its members, or vice versa, is an illustration of this principle. In such an action one partner would have to be joined both as a plaintiff and as a defendant, and a person is disqualified to sue himself.[78]

So, if a partnership become possessed of a negotiable security which has been procured by one partner upon the understanding that he will punctually provide for the payment thereof at its maturity, the partnership cannot sue upon such security, because the same partner must be made one of the plaintiffs; and, as it is clear in such a case that he could not maintain any suit in his own name thereon, the same objections will avail against him as a coplaintiff.[79] So, also, a partner holding a security of the firm by indorsement from the payee or other indorser cannot sue the indorser thereon.[80]

A partnership cannot maintain an action if one partner is an alien enemy. A state of war suspends all commercial intercourse between the belligerents. and shuts their courts against all suits and pro-

[76] See ante, p. 362.

[77] Bates, Partn. § 1035 et seq. See, also, Cochran v. Cunningham's Ex'r, 16 Ala. 448; Morse v. Bellows, 7 N. H. 549; Salmon v. Davis, 4 Bin. (Pa.) 375.

[78] See ante, p. 309.

[79] Story, Partn. § 237; Sparrow v. Chisman, 9 Barn. & C. 241. See Richmond v. Heapy, 1 Starkie, 202.

[80] Bailey v. Bancker, 3 Hill (N. Y.) 188.

ceedings and all claims and persons who have acquired and retained a hostile character.[81]

Perhaps the most numerous class of cases where this doctrine is invoked is where one partner has wrongfully disposed of partnership property, as where he has released a firm debtor or used firm property in the payment of his individual debts, and the firm seeks to recover the debt or the property. This is obviously a firm claim, and the guilty partner is a necessary co-plaintiff. He cannot recover unless he is allowed to repudiate his former act, and unless he can recover his co-partners cannot. The courts have hopelessly disagreed in their application of the doctrine to this class of cases.

In considering this class of cases, a distinction should be observed between (1) acts of the partner which, though wrongful, are yet done within the course of the partnership business, and which may therefore be considered as the acts of the firm, and (2) acts which are not done in the course of the partnership business, but which are wrongs to the other partners.

(1) A wrongful act done by one partner in the course of the partnership business is the wrongful act of the firm, and, of course, no cause of action in favor of the firm can arise from it.[82] Thus, fraud on the part of one partner in procuring a note is available as a defense to an action thereon by all the partners jointly, i. e. by the firm.[83] So, where one partner procures goods for the firm by false representations, and fraudulently disposes of them, all the partners are jointly liable.[84] Likewise, a release of a firm debt by one partner is ordinarily the act of the firm.[85]

(2) It is in the cases where a partner has wrongfully disposed of partnership property, not in the course of the partnership business, but in fraud of his co-partners, that the decisions are most conflict-

81 Story, Partn. § 240; McConnell v. Hector, 3 Bos. & P. 113; Griswold v. Waddington, 16 Johns. (N. Y.) 438.

82 But as between themselves, in the settlement of their partnership accounts, the wrongdoing partner may sometimes be solely chargeable with whatever damages arise from his act.

83 Kilgore v. Bruce (Mass.) 44 N. E. 108.

84 Banner v. Schlessinger (Mich.) 67 N. W. 116.

85 Dyer v. Sutherland, 75 Ill. 583; Myrick v. Dame, 9 Cush. (Mass.) 248; Cochran v. Cunningham's Ex'r, 16 Ala. 448; Salmon v. Davis, 4 Bin. (Pa.) 375; Morse v. Bellows, 7 N. H. 549.

ing. Two classes of cases may be considered: (a) Where chattels, exclusive of money, are used, and (b) where money is used. Each will be considered separately. Where it is the credit of the firm that is used, as where one partner uses firm paper for his private purposes, the firm can defend by showing that the paper was issued without authority, except, of course, as to a bona fide holder. The rights and liabilities of the parties under these circumstances have already been discussed.[86]

(a) Where firm chattels other than money are wrongfully disposed of by one partner, various opinions are held as to the possibility of an action being maintained by the partners jointly for their recovery.

In some jurisdictions it is held squarely that the guilty partner cannot, by thus joining with him his co-partners, repudiate his own act, but that his disability affects all the partners, and, therefore, that the action cannot be maintained.[87] Jones v. Yates [88] is a leading English case in support of this view. In that case, Sykes and Bury being partners, Sykes fraudulently gave the bills of the partnership in discharge of his private debt, and also applied part of the partnership funds to the same purpose. The question was whether the partners Sykes and Bury could recover in a joint action the amount of the bills and of the money in a court of law, by an action of trover for the bills of assumpsit for the money, and it was held that they could not. So, it has been held in this country that if one member of a partnership settles a demand due from him individually by setting off and discharging a demand due from his creditors to the partner, although this is a fraud upon the partnership, no action at law can be maintained on behalf of the partnership to recover the demand due it from such creditor.[89]

[86] See ante, p. 226; Bates, Partn. § 1036.

[87] Church v. Bank, 87 Ill. 68 (cf. Brewster v. Mott, 4 Scam. [Ill.] 378); Homer v. Wood, 11 Cush. (Mass.) 62; Farley v. Lovell, 103 Mass. 387; Craig v. Hulschizer, 34 N. J. Law, 363; Weaver v. Rogers, 44 N. H. 112; Blodgett v. Sleeper, 67 Me. 499. One who cannot sue by himself cannot do so merely by joining others with him. Wallace v. Kelsall, 7 Mees. & W. 264, per Parke, B.

[88] 9 Barn. & C. 532.

[89] In Homer v. Wood, 11 Cush. (Mass.) 62 (approved in Grover v. Smith, 165 Mass. 132, 42 N. E. 555), the court limited its decision to the precise case before

In some jurisdictions it is held just as squarely that the partners can maintain an action to recover the property. Rogers v. Batchelor [90] is the leading case in support of this view. Story, J., said: "In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the rights of his partners unless they have assented. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had." The court further held that it made no difference whether the separate creditor had knowledge that there was a misappropriation of the partnership fund or not. The position taken was that, if he had such knowledge, he would be guilty of gross fraud, not only in morals, but in law; but that knowledge was not an essential ingredient in the case. The true question was said to be whether the title to the property had passed from the partnership to the separate creditor. If it had not, then the partnership might reassert its title to it in the hands of such creditor. This view is followed in many cases.[91] Viles v. Bangs [92] was an action for the value of goods sold to defendant. The defense was that the goods had been taken under an agreement with one partner in payment of his private debt. The court held that plaintiff could recover. The court said: "A recovery can only be defeated by the court sustaining this appropriation of the partnership property; and, by giving force and effect to the settlement, the plaintiff does not trace his cause of action through the wrongful act of his partner, but the defendants claim that he is bound by it."

In some jurisdictions the transaction may be treated as, in effect, a sale, and the separate creditor is liable to the firm in assumpsit

it, in which it was admitted that the defendant had acted in good faith in settling with the fraudulent parties. In Grover v. Smith, supra, Holmes, J., said that the good faith of defendant was immaterial.

[90] 12 Pet. 221.

[91] Cotzhausen v. Judd, 43 Wis. 213; Purdy v. Powers, 6 Pa. St. 492; Forney v. Adams, 74 Mo. 138; Ackley v. Staehlin, 56 Mo. 558; Thomas v. Pennrich, 28 Ohio St. 55; Burwell v. Springfield, 15 Ala. 273; Liberty Sav. Bank v. Campbell, 75 Va. 534; Johnson v. Crichton, 56 Md. 108.

[92] 36 Wis. 131; Estabrook v. Messersmith, 18 Wis. 545, distinguished, but doubted.

for the value of the goods.[93] The doctrine has been held not applicable to counterclaims.[94] Where the guilty partner is not a party, as where the suit is by an assignee for the benefit of creditors, the action has been sustained.[95] So, also, the disqualification does not affect the right of a creditor to pursue the property.[96]

Of course, the defrauded partners cannot maintain an action at law alone against either the guilty partner or the one with whom he dealt. The damage, being a joint damage, cannot be recovered in separate actions. The remedy is in equity.[97]

(b) Where the property wrongfully disposed of by one partner is money, as distinguished from other chattels of the firm, the title to the money, nevertheless, passes, and cannot be recovered by the firm, provided the grantee of the guilty partner acted bona fide. This is certainly true in those jurisdictions where it is held even as to ordinary chattels that they cannot be recovered by the firm, and it is probably true in all jurisdictions. Money is a peculiar species of property, and even a thief can pass title to it to an innocent person.[98] If the defendant knew the partner was using firm money, the ordinary rule applies; and it can be recovered or not, according to the view taken of the general question.[99]

93 Daniel v. Daniel, 9 B. Mon. (Ky.) 195. Cf. Grover v. Smith, 165 Mass. 132, 42 N. E. 555. And see Ackley v. Staehlin, 56 Mo. 558; Forney v. Adams, 74 Mo. 138; Dob v. Halsey, 16 Johns. (N. Y.) 34.

94 Bates, Partn. § 1043, citing Cornells v. Stanhope, 14 R. I. 97. See, also, Craig v. Hulschizer, 34 N. J. Law, 363.

95 Thomas v. Stetson, 62 Iowa, 537, 17 N. W. 751; Cotzhausen v. Judd, 43 Wis. 213; Thomas v. Pennrich, 28 Ohio St. 55.

96 Bates, Partn. § 1045.

97 Miller v. Price, 20 Wis. 117; Craig v. Hulschizer, 34 N. J. Law, 363; Fenton v. Block, 10 Mo. App. 536. See ante, p. 322. See, also, Halstead v. Shepard, 23 Ala. 558; Church v. Bank, 87 Ill. 68. One partner cannot maintain an action at law for damages against a vendee for partnership goods sold him by a co-partner in fraud of plaintiff's rights. Reed v. Gould (Mich.) 63 N. W. 415.

98 See Bates, Partn. § 1048.

99 Foster v. Fifield, 29 Me. 136; Davis v. Smith, 27 Minn. 390, 7 N. W. 731.

ACTION IN FIRM NAME.

169. In many jurisdictions actions in the firm name are authorized by statute, either generally or where the names of the members are unknown at the time the action is commenced.

It has been seen that, in the absence of statute, actions must be brought by and against the partners as individuals. In England and in many of the states of this country, suits in the firm name are now authorized by statute, either generally or in cases where the names of the members are unknown.[100] These statutes are not mandatory, but are optional, and the partners may be sued in their individual names. The statutes, being remedial, should be liberally construed. The following observations by Sir Frederick Pollock as to the effect of the English statutes, are in the main applicable to the American statutes: "These rules, it will be observed, do not introduce anything that amounts to the recognition of the firm as an artificial person, distinct from its members. They allow the name of the firm to be used for the purpose of making procedure quicker and easier; and creditors of a firm have now the great practical convenience of being able to pursue their claims, even to judgment, without first ascertaining who all the partners are. The substantive results, however, are the same as under the former practice. Actions between a firm and one of its own members, or between two firms having a common member, which are allowed by the law of Scotland, remain, it is conceived, inadmissible in England; and a judgment against a firm has precisely the same effect that a judgment against all the partners had formerly." [101]

[100] See Bates, Partn. § 1059 et seq. Suits may be brought either against a partnership as such, or against all the individuals members thereof, or against any or either of them. IOWA: McClain's Code 1888, § 3758. NEW MEXICO: Comp. Laws 1884, § 1886. There can be no such thing as a partnership with but one partner, and therefore a statute authorizing actions by a firm to be brought in the firm name does not authorize an action by an individual in a name indicating a partnership which really does not exist, but under which he does business. Stirling v. Heintzman, 42 Mich. 449, 4 N. W. 165.

[101] Pol. Partn. p. 121.

See 86-89 & n. 3 supra.

CHAPTER IX.

DISSOLUTION.

170. Causes of Dissolution—Partnership for a Definite Time.
171. Partnership for an Indefinite Time.
172. Causes Subject to Stipulation.
(a) Death of Partner.
(b) Alienation of Partner's Share.
(c) Bankruptcy of Partner.
(d) Marriage of a Feme Sole Partner.
173. Expulsion.
174. Causes not Subject to Stipulation.
(a) Events Rendering Business Unlawful.
(b) Bankruptcy of the Firm.
175. Causes for which a Court will Decree a Dissolution.
(a) Insanity or Other Incompetency of a Partner.
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176. Consequences of Dissolution—As to Third Persons.
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178. Winding Up Business.
179. Notice of Dissolution.
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181. Payment of Firm Debts.
182. Earnings after Dissolution.
183. Disposition of Surplus Property.

CAUSES OF DISSOLUTION—PARTNERSHIP FOR A DEFINITE TIME.

170. When a partnership has been created for a definite term, one partner cannot terminate the relation without the consent of his co-partners.

The question as to when and how the dissolution of a partnership takes place depends, first, upon what, if any, arrangement the partners have made looking to that consummation. They may have agreed among themselves that the relation shall exist for a certain time named, or shall cease to exist upon the arrival of some certain day named. In that case the dissolution takes place ac-

cordingly, unless it shall have taken place before on account of some event, unprovided for by the partners, that, under the law, is cause for its dissolution; but a partner has no right, out of mere caprice, to bring the relation to a close,[1] although he can when he and

[1] In Solomon v. Kirkwood, 55 Mich. 256, 259, 21 N. W. 336, 337, Cooley, C. J., says: "We think the judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, 'is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and, after such publication, the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day, by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it.' Skinner v. Dayton, 19 Johns. (N. Y.) 513, 538. To the same effect are Mason v. Connell, 1 Whart. (Pa.) 381, and Slemmer's Appeal, 58 Pa. St. 155. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied, there is commonly no legal policy to be subserved by compelling a continuance of the relation; and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages; and that responsibility would exist in breaking a contract of partnership as in other cases." Although a partnership has been created for a definite term, the partners may, nevertheless, terminate the relation by mutual consent before that time has expired. Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777; Bank of Montreal v. Page, 98 Ill. 109. An agreement by the partners to dissolve may be implied from an abandonment of the undertaking. Ligare v. Peacock, 109 Ill. 94; Harris v. Hillegass, 54 Cal. 463. But cf. Goddard v. Pratt, 16 Pick. (Mass.) 412, 433. A dispute having arisen between partners as to the construction of a provision in the partnership articles, a memorandum was executed, reciting that written notice of the termination of the partnership was waived by both parties, and that the firm property should be divided in a certain way between the parties. In an action for an accounting, both parties alleged the termination of the partnership as of the date of said memorandum. Held that, as both parties considered the partnership terminated by the execution of said memorandum, the provisions of the latter as to the distribution of the firm property were binding on them also. (59 Ill. App. 28, affirmed.) McKee v. Cowles, 161 Ill. 201, 43 N. E. 785. In a partnership for a definite time, any partner may terminate the

his co-partners have not so agreed as to the term. Taking, now, the first case, this much can be said with certainty: that, when there is a specific agreement between the partners defining the term of the relation, the partnership is dissolved at the expiration of the term named. When the partners have, by their so stipulating with each other, agreed upon some certain time for the relation to terminate, the partnership is dissolved by the expiration of that time.[3] It requires no act on the part of the firm, or any of the partners, in such a case, to make the fact of dissolution complete; for, although there may be no settlement or accounting then, and no steps at all are taken in recognition of the arrival of the day previously agreed upon for the relation to come to an end, the firm is dissolved. The partners may proceed, if they choose to do so, with the business, apparently, just as it was before; but, in spite of them, their association is a new partnership.

SAME—PARTNERSHIP FOR AN INDEFINITE TIME.

171. When a partnership has been created for an indefinite period, it may be dissolved at any time by notice by one partner, by his assignment for the benefit of creditors, or by his bankruptcy.

When there is no specific agreement among the partners defining the term of the relation, the partnership is one at will;[4] that is, in such case it is at the pleasure of any one of the partners to dis-

power of his co-partners to bind him by contracts, by giving notice of dissolution, although by so doing he may become liable to damages for his breach of partnership agreement. Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Blake v. Dorgan, 1 G. Greene (Iowa) 537.

[3] 1 Colly. Partn. § 105. A partnership is dissolved by the completion of the business contemplated. Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840. Where a commercial partnership expires by limitation, and the business is continued as before, the partners are bound inter se, and to third persons, as if articles had been executed, and the relation can be terminated only after notice. Jurgens v. Ittmann, 47 La. Ann. 367, 16 South. 952.

[4] As to what will constitute a partnership at will, see Pearce v. Ham, 113 U. S. 585, 5 Sup. Ct. 676; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Cole v. Moxley, 12 W. Va. 730; Richards v. Baurman, 65 N. C. 162.

solve the partnership.[5] He need only to give the others notice of dissolution, and the partnership is dissolved ipso facto.[6] Again, if any partner in a partnership at will makes an assignment for the benefit of his creditors, or is adjudicated bankrupt, and a trustee is appointed, this also dissolves the relation,[7] although it would be otherwise in the case of a partnership other than one at will. "If a member of an ordinary partnership assigns, where the partnership is at will, the assignment dissolves it." [8]

SAME—CAUSES SUBJECT TO STIPULATION.

172. The partners may provide in their articles that the following causes shall not cause a dissolution of the partnership, as they would in the absence of such a stipulation:

(a) Death of a partner (p. 397).

(b) Alienation of a partner's share (p. 397).

(c) Bankruptcy of a partner (p. 399).

(d) Marriage of a feme sole partner (p. 401).

There are other things that cause the partnership to dissolve in case equally of a firm established to exist for a stated time and one established to exist at the will of the parties. In all cases, without regard to whether there is a specific agreement defining the term of the relation, dissolution may come through the happening of some other event. Such an effect, as to some of these events, may, to be sure, be provided against in the articles, so that, although, in strictness, the event does bring about a dissolution, the partners are

[5] McElvey v. Lewis, 76 N. Y. 373; Fletcher v. Reed, 131 Mass. 312; McMahon v. McClernan, 10 W. Va. 419. A partner of a firm formed for an indefinite time may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose, and he will not be liable to his co-partners for damages for his withdrawal. Fletcher v. Reed, 131 Mass. 312; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Skinner v. Tinker, 34 Barb. (N. Y.) 333; Carlton v. Cummins, 51 Ind. 478; Howell v. Harvey, 5 Ark. 270, 280; Featherstonhaugh v. Fenwick, 17 Ves. 298.

[6] Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Eagle v. Bucher, 6 Ohio St. 295; Wheeler v. Van Wart, 9 Sim. 193; Van Sandan v. Moore, 1 Russ. 441, 464.

[7] See post, pp. 399, 403.

[8] Riddle v. Whitehill, 135 U. S. 621, 632, 10 Sup. Ct. 924.

bound mutually, so that the business proceeds, notwithstanding the actual changes involved in the events referred to. Thus Collyer says:[9] "As the law has permitted the partners to limit the duration of the contract, so it has allowed them to qualify the causes of its dissolution."

Death of a Partner.

In the case of a partnership formed to exist for a great number of years, it is frequently provided in the articles that, upon the death of a partner occurring, the legatees or executors of the decedent may assume the latter's share, and carry on the business in conjunction with the other partners. Such provisions the law will enforce.[10]

Alienation of a Partner's Share—Actual Transfer.

It has been shown before[11] that one of the leading principles of the law of partnership is that of delectus personæ, which suggests

[9] Colly. Partn. § 105.

[10] Scholefield v. Eichelberger, 7 Pet. 586; Burwell v. Cawood, 2 How. 560; Walker v. Wait, 50 Vt. 668; McNeish v. Oat Co., 57 Vt. 316; Goodburn v. Stevens, 5 Gill (Md.) 1. The death of a partner causes a dissolution of the firm, notwithstanding a provision in the articles for the continuance of the partnership for a fixed period. Hoard v. Clum, 31 Minn. 186, 17 N. W. 275. A contract of service made with a firm is not, as a matter of law, terminated by the death of a partner, where the business is thereafter continued as before. Hughes v. Gross (Mass.) 43 N. E. 1031. See, also, Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Navigation Co. v. Warriner, 35 Fla. 197, 16 South. 898; Hannegan v. Roth, 12 Wash. 65, 40 Pac. 636. An agreement, in co-partnership articles, that upon the death of any member his heirs or legal representatives shall occupy the same place in the co-partnership as was occupied by such partner, will prevent a dissolution by the death of a partner. Rand v. Wright, 141 Ind. 226, 39 N. E. 447. An agreement, in partnership articles, that upon the death of any partner his heirs or legal representatives shall occupy his place in the partnership, controls only the property of the deceased which is in the firm at the time of his death. Rand v. Wright, supra. A stipulation that the death of a partner shall not operate as a dissolution of the association, but that the decedent's shares shall thereupon vest in his executors, or administrators, or devisees of the stock, who shall succeed as in case of transfer on the books, in which case the assignee of stock is made subject to the rights and obligations of the original owner thereof, does not compel an executor of the deceased partner to accept the stock of his testator, so as to charge the decedent's general estate with firm debts contracted after his death. Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080.

[11] Ante, p. 74.

the right enjoyed by each partner to have a choice submitted to him as to who shall be his associates in the business.[12] If a partner had the right to assign his share to a stranger, and have that stranger assume the place of his assignor in the firm, without the consent of the other partners being first obtained, seeds of discomfort and disagreement among the members of the firm would be sown necessarily; and so the law protects the partners against having a stranger thus thrust upon them.[13] "Where the partnership is at will, an assignment, and notice thereof, must, it is conceived, operate as a dissolution. But where the partnership is for a definite period, which is not expired, there is more difficulty in arriving at a conclusion. To hold that the assignment operates as a dissolution renders it competent for a partner to do indirectly what he cannot do directly, viz. dissolve before the expiration of the time for which the partnership was entered into. On the other hand, to hold that the partnership continues is not just to the assignor's co-partners. The assignment does not, of itself, create a partnership between them and the assignee; but it does deprive the assignor of all his interests in the concern, and his co-partners may fairly urge that they never contemplated a partnership with a person having no interest in it. It seems to be impossible, therefore, to deny their right to make the assignment a ground for dissolution."[14] Thus it appears that it is at the option of the partner, other than the assignor, to make the assignment a cause for dissolution, when the partnership is one stipulated to endure for a fixed term. However, by further stipulation in the articles, the partners may expressly deprive themselves of this option, so that virtually the assignment of a share does not either dissolve the partnership ipso facto or afford a cause for dissolution. But disso-

[12] When the delectus personarum does not exist, the partnership is not dissolved by the transfer of a partner's interest. Kahn v. Smelting Co., 102 U. S. 641; Machinists' Nat. Bank v. Dean, 124 Mass. 81; Gaylor v. Castle, 42 Cal. 367.

[13] Fourth Nat. Bank v. Carrollton R. Co., 11 Wall. 624; McCall v. Moss, 112 Ill. 493; Horton's Appeal, 13 Pa. St. 67; Cochran v. Perry, 8 Watts & S. (Pa.) 262; Merrick v. Brainard, 38 Barb. (N. Y.) 574; Mudd v. Bast, 34 Mo. 465; Barkley v. Tapp, 87 Ind. 25.

[14] 2 Lindl. Partn. 584, citing Jefferys v. Smith, 3 Russ. 158; Marquand v. President, etc., 17 Johns. (N. Y.) 525; Glyn v. Hood, 1 Giff. 328; Pinkett v. Wright, 2 Hare, 120; Murray v. Pinkett, 12 Clark. & F. 764.

lution does not result from the alienation of anything less than the whole of a partner's share; for by transferring a mere portion, no matter how large, of his share, the partner does not withdraw from the firm.[15]

Same—Agreement to Hold in Trust for a Stranger.

Whether or not such an agreement could dissolve the partnership is a question that has never been determined, Lindley says; but he thinks that, inasmuch as the cestui que trust does not become a partner, the co-partners are entitled to a dissolution upon notice of the trust being brought to them.[16]

Bankruptcy of a Partner.

In the text of Collyer on Partnership,[17] bankruptcy is given as an instance of one of the causes of dissolution that the partners by agreement cannot modify the effect of. But in a footnote it is ventured as an opinion that an agreement "that, if any of the partners shall become bankrupt, the partnership shall be nevertheless continued after the allowance of his certificate," would be good. Lindley says that it was decided in one case[18] that a stipulation in the articles of partnership to the effect that, on the bankruptcy of one of the partners, his share should be taken by the other at a valuation, was not binding on the assignee; but he adds: "But the circumstances of the case were somewhat peculiar, and there seems no reason why such a stipulation should be ineffectual."[19] In the case of a partnership at will the adjudication would necessarily dissolve the relation.[20] But in a case where such an adjudica-

15 Burnett v. Snyder, 76 N. Y. 344.

16 2 Lindl. Partn. 584, citing Jefferys v. Smith, 3 Russ. 158; Newry, etc., R. Co. v. Moss, 14 Beav. 64; Bugg's Case, 2 Drew. & S. 452; Goddard v. Hodges, 1 Cromp. & M. 33 (contra). In 2 Bates, Partn. § 586, the rule is stated the other way, and the following cases cited: Bentley v. Bates, 4 Younge & C. 182, 190; Monroe v. Hamilton, 60 Ala. 226; Du Pont v. McLaran, 61 Mo. 502; State v. Quick, 10 Iowa, 451; Receivers of Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; Moore v. Knott, 12 Or. 260, 266, 7 Pac. 57; Bank of State of North Carolina v. Fowle, 4 Jones, Eq. (N. C.) 8.

17 3d Am. Ed. (1848) § 101.

18 Wilson v. Greenwood, 1 Swanst. 471.

19 Lindl. Partn. 647.

20 Riddle v. Whitehill, 135 U. S. 621, 632, 10 Sup. Ct. 924; Wilkins v. Davis, 15

tion is made before the end of the term stipulated by the partners for the partnership to exist, there seems to be no reason for an infallible rule to the same effect; and this notwithstanding that the result of the adjudication is that the assignee becomes tenant in common with the solvent partners of an undivided moiety of the partnership effects, subject to the partnership accounts.[21] We have seen that an assignment of his share by a partner, when a status of insolvency or bankruptcy is not involved, does not in all cases dissolve the partnership ipso facto, but merely gives a right to have the relation dissolved, or, in other words, a right to an account. Why should bankruptcy work a more summary dissolution than the voluntary acts of the partners? In the case of Fourth Nat. Bank of New York v. New Orleans & C. R. Co.,[22] Strong, J., speaks of all modes of alienation as equally conferring rights upon the alienee. What would appear to be the better rule on this subject is that laid down in Riddle v. Whitehill:[23] "If a member of an ordinary partnership assigns where the partnership is at will, the assignment dissolves it, and if it is not at will the assignment may be treated by the other members of the concern as a cause for dissolution. The assignee of one partner cannot be made a member of the partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership had not yet expired, may be subject to modification according to circumstances." In any case a bankruptcy or insolvency of a partner that becomes cause for a dissolution does not consist in the partner merely being unable to pay his debts. There must be something in the nature of an assignment, either voluntary or involuntary, making the partner bankrupt by virtue of some act or proceeding undertaken for that purpose.[24] But even that would not dissolve the partnership against the will of the

N. B. R. 60, Fed. Cas. No. 17,664; Marquand v. President, etc., 17 Johns. (N. Y.) 525; Galcott v. Dudley, 4 Scam. 427; Blackwell v. Claywell, 75 N. C. 213.

[21] West v. Skip, 1 Ves. Sr. 239, 242.

[22] 11 Wall. 624.

[23] 135 U. S. 621, 632, 10 Sup. Ct. 924.

[24] Arnold v. Brown, 24 Pick. (Mass.) 89; President, etc., Mechanics' Bank v. Hildreth, 9 Cush. (Mass.) 356.

co-partners, if the proceeding was undertaken merely for the purpose of dissolving the firm, and without real cause otherwise.[25]

Marriage of a Feme Sole Partner.

Such a marriage, since husband and wife are one, would have the same effect, technically, at common law, as the assignment of a partner's share; a new person being presented to the co-partners without their assent being first asked to his coming into the firm. Hence the marriage of a feme sole partner was, in England, before the married women's act (1882), held to be, just as the assignment of a share was, cause for dissolution.[26] In this country, whether the marriage would or would not have this effect would depend upon the laws of the state in which the partners reside.[27] All that has been said above has reference to a marriage to a stranger to a firm. The intermarriage of two persons composing a firm dissolves the partnership, for the reason that the two become then one in law, and a partnership composed of one partner would be an anomaly.[28] There seems to be no reason, in states where the marriage of a feme sole partner dissolves the partnership, why it may not be provided that such a marriage shall not have that effect.

173. EXPULSION—The partners may stipulate in their articles that a majority may expel any partner, under certain restrictions, for misconduct.

In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method, except a dissolution, by which a partner can retire against the will of his co-partners, so there is no method, except a dissolution, by which one

25 Amsinck v. Bean, 22 Wall. 395.

26 2 Lindl. Partn. 583; Nerot v. Burnand, 4 Russ. 247.

27 Brown v. Chancellor, 61 Tex. 437.

28 Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217. A married woman may engage in business with her husband as partner. Burney v. Grocery Co. (Ga.) 25 S. E. 915.

partner can be got rid of against his own will.[29] With a view to facilitate the removal of a partner who misconducts himself, it is not unfrequently agreed that a power to expel shall be exercisable in certain events and under certain restrictions. These "expulsion clauses," as they are termed, are always construed strictly, and no expulsion under them will be effectual unless the expelling partners have acted with perfect good faith.[30]

SAME—CAUSES NOT SUBJECT TO STIPULATION.

174. The following causes dissolve a partnership, though the partners have inserted a stipulation to the contrary in their articles:

(a) Events rendering business unlawful (p. 402).

(b) Bankruptcy of the firm (p. 403).

Events Rendering Business Unlawful—War.

Any event that renders the further prosecution of business unlawful, or renders unlawful the continued association of the partners for that purpose, dissolves the firm.[31] As an instance of such an event the following is suggested in Pollock's Digest:[32] "A. is a partner with 10 other persons in a certain business. An act was passed which made it unlawful for more than 10 persons to carry on business. The partnership of which A. was a member was dissolved." The breaking out of war between two countries in which partners are severally resident necessarily ends the relation, since the partners are debarred from intercourse with each other.[33]

[29] Clarke v. Hart, 6 H. L. Cas. 633; Crawshay v. Collins, 15 Ves. 218, 226; Featherstonhaugh v. Fenwick, 17 Ves. 298, 309.

[30] Patterson v. Silliman, 28 Pa. St. 304; Evans v. Philadelphia Club, 50 Pa. St. 107; Berry v. Cross, 3 Sandf. Ch. 1; Gorman v. Russell, 14 Cal. 531; Blisset v. Daniel, 10 Hare, 493; Wood v. Woad, L. R. 9 Exch. 190; Steuart v. Gladstone, 10 Ch. Div. 626; Russell v. Russell, 14 Ch. Div. 471, 478.

[31] 2 Lindl. Partn. 585.

[32] Poll. Partn. 51.

[33] Hanger v. Abbott, 6 Wall. 532; Matthews v. McStea, 91 U. S. 7; Bank of New Orleans v. Matthews, 49 N. Y. 12; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Hillyard v. Mutual Ben. Life Ins. Co., 35 N. J. Law, 414.

Bankruptcy of the Firm.

Bankruptcy of the firm, though not bankruptcy of a partner, except in partnerships at will, dissolves the partnership ipso facto.[34] "If a firm of partners, or even any one member of the firm, is adjudged bankrupt, the firm is dissolved."[35] Lindley gives two reasons for this being the case: First, "because it is impossible for the business of the firm to be carried on"; and, second, "because there is a transfer of each bankrupt's interest to his trustee." Applying the first of these reasons to an adjudication of bankruptcy as to the whole firm it is sufficient of course and it seems too plain to need exposition that such an adjudication necessarily dissolves the partnership. It does not seem so plain that an adjudication as to any one partner must render in all cases the further prosecution of the business impossible.[36]

Effect of an Execution against a Partner.

The execution of a writ of fi. fa. against partnership property does not, of itself, dissolve the partnership;[37] but dissolution is the inevitable consequence of an undivided interest in partnership property being acquired under such a writ by a stranger.[38] Why should the purchase at the sheriff's sale dissolve the partnership, against the wishes of the co-partner of the partnership, in a partnership other than the one at will? The purchaser does not thereby enter the firm, and his purchase assumes substance at the dissolution

[34] McKelvy's Appeal, 72 Pa. St. 409; Wells v. Ellis, 68 Cal. 243, 9 Pac. 80.

[35] 2 Lindl. Partn. 577.

[36] See ante, p. 399.

[37] Arnold v. Brown, 24 Pick. (Mass.) 89; Foster v. Hall, 4 Humph. (Tenn.) 348, 352.

[38] Renton v. Chaplain, 9 N. J. Eq. 62; Nixon v. Nash, 12 Ohio St. 647; Sanders v. Young, 31 Miss. 111; Hershfield v. Claflin, 25 Kan. 166; Carter v. Roland, 53 Tex. 540; Skipp v. Harwood, 2 Swanst. 586. And see Pol. Partn. art. 48. That a transfer to a co-partner works a dissolution, see Sistare v. Cushing, 4 Hun (N. Y.) 503; Edens v. Williams, 36 Ill. 252; Wiggin v. Goodwin, 63 Me. 389; Rogers v. Nichols, 20 Tex. 719; Horton's Appeal, 13 Pa. St. 66. That no dissolution is caused if no retirement of a partner is contemplated, see Russell v. Leland, 12 Allen (Mass.) 349; Buford v. Neely, 2 Dev. Eq. (N. C.) 481. That such a transfer is only evidence tending to show a dissolution, see Taft v. Buffum, 14 Pick. (Mass.) 322; Waller v. Davis, 59 Iowa, 103, 12 N. W. 798.

already provided for. There seems to be no reason why he should be able to accelerate a dissolution already set for a future day.

SAME—CAUSES FOR WHICH A COURT WILL DECREE A DISSOLUTION.

175. A partnership will be dissolved by a decree of court for the following causes:

(a) Insanity or other incompetency of a partner (p. 404).

(b) Misconduct of a partner (p. 404).

(c) Impossibility of making profit (p. 406).

Insanity or Other Incompetency.

A court of equity will decree the dissolution of a partnership upon petition and proof given of the fact of a partner having lost his mind.[40] The petitioner need not be a co-partner, although he is so usually, but may be the lunatic himself, by his committee, or by his next friend in default of his having a committee.[41] In the latter case the court may, before acting upon the petition, direct that proceedings be had before the proper tribunal to have the state of the partner's mind determined.[42] Any other permanent incapacity of a partner to act up to his part of the agreement of partnership is a cause for dissolution; for instance, the placing of the partner under guardianship.[43]

Misconduct of a Partner.

The court will dissolve a partnership on the ground that a partner so seriously misconducts himself as to render it impossible for

[40] Raymond v. Vaughan, 17 Ill. App. 144; Rowlands v. Evans, 30 Beav. 302. War: Matthews v. McStea, 91 U. S. 7; Buchanan v. Curry, 19 Johns. (N. Y.) 137. Bankruptcy: Talcott v. Dudley, 5 Ill. 427; Marquand v. Manufacturing Co., 17 Johns. (N. Y.) 525; Moody v. Rathburn, 7 Minn. 89 (Gil. 58). Completion of enterprise: Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Sims v. Smith, 11 Rich. (S. C.) 565. Sale of interest: Carter v. Roland, 53 Tex. 540; Aspinall v. Railway Co., 11 Hare, 325.

[41] Jones v. Lloyd, L. R. 18 Eq. 265; Anon., 2 Kay & J. 441; Sayer v. Bennet, 1 Cox, 107.

[42] Sayer v. Bennet, 1 Cox, 107; Leaf v. Coles, 1 De Gex, M. & G. 174; 2 Lindl. Partn. 579.

[43] Mechem, Partn. § 249.

his co-partners to continue to act with him.[44] But it is not considered to be the duty of the court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill temper or misconduct of one or more of the partners, unless the others are in effect excluded from the concern,[45] or unless the misconduct is of such a nature as utterly to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together.[46] Where a dissolution is sought on this latter ground, it would seem that the misconduct must be such as to affect the business, not merely by shaking its credit in the eyes of the world, but by rendering it impossible for the partners to conduct their business together according to the agreement into which they have entered.[47] When the court dissolves a partnership on the ground of misconduct, the dissolution dates from the judgment, unless there are special grounds for ordering a dissolution as from some other date.[48]

Same—Degree of Misconduct.

It may, however, be usefully observed here that keeping erroneous accounts, and not entering receipts,[49] refusal to meet on matters of business,[50] continued quarreling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation,[51] have been held sufficient to justify a dissolution. It

44 Rosenstein v. Burns, 41 Fed. 841; Page v. Vankirk, 1 Brewst. (Pa.) 282; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Waters v. Taylor, 2 Ves. & B. 299; Smith v. Jeyes, 4 Beav. 502. A conveyance by one partner of partnership realty in payment of an individual debt is such a fraud on the firm, its assets only slightly exceeding its liabilities, as warrants a dissolution of the partnership. Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

45 Roberts v. Eberhardt, Kay, 148; Wray v. Hutchinson, 2 Mylne & K. 235; Marshall v. Colman, 2 Jac. & W. 266; Goodman v. Whitcomb, 1 Jac. & W. 589.

46 Harrison v. Tennant, 21 Beav. 482; Smith v. Jeyes, 4 Beav. 503.

47 Anon., 2 Kay & J. 441.

48 Lyon v. Tweddell, 17 Ch. Div. 529.

49 Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Cattle v. Leitch, 35 Cal. 434; Cheesman v. Price, 35 Beav. 142; Goodman v. Whitcomb, 1 Jac. & W. 589, 593.

50 Gow, Partn. p. 227; De Berenger v. Hamel, 7 Jarm. & B. Conv. (25th Ed.) 26.

51 Sutro v. Wagner, 23 N. J. Eq. 388; Abbot v. Johnson, 32 N. H. 9; Watney

is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner.[52] All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.[53] In Essell v. Hayward [54] it was held that, where one partner had become liable to a criminal prosecution by reason of his having been guilty of a fraudulent breach of trust, his co-partner had a right to have the partnership dissolved; and, a notice to dissolve having been given by him, the partnership was ordered to stand dissolved as from the date of the notice, although the partnership was not at will.

Same—Misconduct on Part of Partner Seeking Dissolution.

It must be borne in mind that the court will never permit a partner, by misconducting himself, and rendering it impossible for his partners to act in harmony with him, to obtain a dissolution on the ground of the impossibility so created by himself.[55] In order to facilitate a dissolution in the event of misconduct, a special clause is usually inserted in partnership articles.

Impossibility of Making Profit.

Where, during the continuance of a co-partnership, it becomes impracticable to carry on its business without great loss, a court of equity will decree a dissolution, in a suit brought for that purpose by one of the partners.[56] Dissensions among the partners, rendering the successful prosecution of the business impossible, have in a number of cases been considered sufficient cause for decreeing a dissolution.[57]

v. Wells, 30 Beav. 56; Pease v. Hewitt, 31 Beav. 22; Leary v. Shout, 33 Beav. 582; Baxter v. West, 1 Drew & S. 173.

[52] 2 Lindl. Partn. 581.

[53] Harrison v. Tennant, 21 Beav. 482.

[54] 30 Beav. 158.

[55] Gerard v. Gateau, 84 Ill. 121; Fairthorne v. Weston, 3 Hare, 387.

[56] Holladay v. Elliott, 8 Or. 84; Rosenstein v. Burns, 41 Fed. 841.

[57] Singer v. Heller, 40 Wis. 544; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Watney v. Wells, 30 Beav. 56.

CONSEQUENCES OF DISSOLUTION—AS TO THIRD PERSONS.

176. Upon the dissolution of a partnership, third persons have a right to

(a) Notice of the dissolution (p. 407).

(b) Payment of claims due from the firm (p. 408).

Notice of Dissolution.

It is due to the public that, where a partnership has been notoriously doing its regular business, it be given notice of the dissolution. A corresponding duty, of course, rests upon the partners to give this notice; and, by the failure of this duty, the partner involved is looked to, to compensate an aggrieved third person. It is said by Collyer:[58] "The principle upon which this responsibility proceeds is the negligence of the partners in leaving the world in ignorance of the fact of the dissolution, and leaving strangers to conclude that the partnership continues, and to bestow faith and confidence on the partnership named in consequence of that belief; and, when one of two innocent persons must suffer from giving the credit, he who has misled the confidence of the other, and has been the cause of credit either by his misrepresentation or his negligence or his fraud, ought to suffer, instead of the other." Thus, an ostensible partner, who, upon retiring from the firm, fails to give notice of his retirement, is liable to a third party for any loss the latter may have suffered by dealing with the continuing firm, under the impression that there had no such retirement taken place. The partner had it in his power to give some sort of notice to the third person, and, without being notified, the third person has a right to assume no change has taken place, for it would be too much to require of one habitually dealing with a firm that he must, before each new transaction they have together, make inquiry as to whether, since the last previous one, there has been any change in the firm membership. If he knew before the transaction that there was such a partnership, did not know of its having been dissolved, and dealt with it under the impression that he was dealing with the old firm, then, in the absence of some legal form of notice, he has

[58] Partn. (3d Ed.) 505.

his right to be reimbursed for the loss to which his mistake subjected him.[59] The persons who are entitled to notice, and the nature of the notice required, in different cases, have been considered in treating of the termination of a partner's liability.[60]

Payment of Claims.

A dissolution of partnership must be followed by an ascertainment of what the firm owes to outside parties, and payment accordingly as soon as assets can be put into proper shape, and applied to that purpose.[61] And in this connection it must be borne in mind that a dissolution under no circumstances discharges any partner of liability for firm debts of a period ending with the dissolution, unless the creditor has in some manner released him; for instance, by admitting the debt to be settled, or accepting an obligation in place of the one binding him. If the firm is dissolved by the retirement of a partner, and the continuing partners assume all the debts, and are accepted as the debtors by the creditor, this, of course, discharges the retiring partner; and so similarly, in case of the death of a partner, would such an acceptance by the creditors release the estate of the partner dying.[62]

SAME—AS TO THE PARTNERS.

177. The consequences of a dissolution as regards the partners themselves will be considered under the following heads:

(a) Winding up business (p. 408).
(b) Notice of dissolution (p. 411).
(c) Sale of good will (p. 412).
(d) Payment of firm debts (p. 413).
(e) Earnings after dissolution (p. 414).
(f) Disposition of surplus property (p. 415).

178. WINDING UP BUSINESS—Upon dissolution the partners have power to do all acts necessary to wind up the business. A surviving partner has the sole right to wind up.

[59] Lovejoy v. Spafford, 93 U. S. 430.
[60] Ante, p. 261.
[61] See ante, p. 273.
[62] See ante, p. 265.

The powers and authority of the partners after the dissolution continue as before as to the sole business then before them,—that is, the winding up of the firm affairs; and, in connection with this, they can bind each other by their acts.[63] Such winding up contemplates, of course, the completion of transactions begun before the dissolution; and here they can bind each other by their act, as before.[64] But they cannot undertake any new business, so as to

[63] Robbins v. Fuller, 24 N. Y. 570; Belanger v. Dana, 52 Hun, 39, 4 N. Y. Supp. 776; Hilton v. Vanderbilt, 82 N. Y. 591; Riddle v. Etting, 32 Pa. St. 412; Major v. Hawkes, 12 Ill. 298; Heartt v. Walsh, 75 Ill. 200; Bender v. Markle, 37 Mo. App. 234; Ruffner v. Hewitt, 7 W. Va. 585; Knowlton v. Rud, 38 Me. 246; Hall v. Clagett, 48 Md. 223; Torrey v. Baxter, 13 Vt. 452; Peacock v. Peacock, 16 Ves. 49, 57. After dissolution, the agency of a partner exists merely for winding up the firm business, collecting credits, and paying off debts. Thursby v. Lidgerwood, 69 N. Y. 198; Lange v. Kennedy, 20 Wis. 279; Bryant v. Lord, 19 Minn. 396 (Gil. 342); Hayden v. Cretcher, 75 Ind. 108; Hawn v. Water Co., 74 Cal. 418, 16 Pac. 196.

[64] Palmer v. Sawyer, 114 Mass. 1; Page v. Wolcott, 15 Gray (Mass.) 536; Jones v. Foster, 67 Wis. 296, 30 N. W. 697; Briggs v. Briggs, 15 N. Y. 471; Hubbard v. Matthews, 54 N. Y. 43. The dissolution of a firm operates as a termination of a power previously given to such firm. Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535. And see Morss v. Gleason, 64 N. Y. 204; Clark v. Wilson, 19 Pa. St. 414; Waller v. Davis, 59 Iowa, 103, 12 N. W. 798; Mudd v. Bast, 34 Mo. 465; White v. White, 5 Gill (Md.) 359. In the absence of fraud, a solvent partner could, on the dissolution of the partnership by the assignment of his insolvent co-partners, mortgage the entire property of the partnership to a creditor of the firm, without rendering himself liable to the other partners for the difference between the actual value of the firm property and the amount for which it was sold under the mortgage. Thompson v. Noble (Mich.) 65 N. W. 563. A firm of which testator was a member having been dissolved by his death, and the provisions of his will for its further continuance being void, it became the duty of the surviving partners to close up the partnership affairs, and on their failure to do so the duty devolved on the executor. Hamlin v. Mansfield, 88 Me. 131, 33 Atl. 788. A surviving partner cannot sue at law on a note discounted by the firm, but executed by the deceased partner to defendant, who indorsed it for the accommodation of the maker. Patton v. Carr, 117 N. C. 176, 23 S. E. 182. A surviving partner may enforce a judgment recovered by the firm in an action before the death of one of the partners. Judy v. Storage Co., 60 Mo. App. 114. A mortgage may be enforced by the survivors of a firm to which it was given. Younts v. Starnes, 42 S. C. 22, 19 S. E. 1011. The legal title of a deceased partner to partnership realty descends to his heir, and the interest of the surviving partners is merely equitable. Hannegan v. Roth, 12 Wash. 65, 40 Pac. 636. See, also, Bollenbacher v. Bank, 8 Ind. App. 12, 35 N. E. 403.

make their co-partners liable.[65] However, a bankrupt partner has no powers at all in settling the firm's affairs after dissolution, any more than has the retiring partner or the representatives of the deceased one.[66]

Surviving Partner.

The surviving partner has the sole power of settling the partnership affairs,[67] so that the representatives of a deceased partner or the assignee of a bankrupt cannot interfere with his selling the firm property, and applying it, or otherwise in attaining the settlement, unless a case can be shown of plain delinquency on his part, in which case a court of equity may be invoked by them to compel him to act as he should act for the good of all interested parties.[68] The sur-

[65] Bell v. Morrison, 1 Pet. 351; Bennett v. Buchan, 61 N. Y. 222; Payne v. Smith, 28 Hun (N. Y.) 104, 106; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Easter v. Bank, 57 Ill. 215; Helm v. Cantrell, 59 Ill. 524; Hicks v. Russell, 72 Ill. 230; Bowman v. Blodgett, 2 Metc. (Mass.) 308; Whitehead v. Bank, 2 Watts & S. (Pa.) 172; Dunlap v. Limes, 49 Iowa, 177; Mauney v. Coit, 80 N. C. 300. General authority to a partner, after dissolution, to close up the partnership indebtedness by executing notes in the firm name, does not authorize him to bind his late co-partner by stipulating in such notes to pay attorney's fees and to waive exemptions. Brown v. Bamberger (Ala.) 20 South. 114.

[66] Amsinck v. Bean, 22 Wall. 395; Ogden v. Arnot, 29 Hun (N. Y.) 146, 149; Talcott v. Dudley, 5 Ill. 427; Hanson v. Paige, 3 Gray (Mass.) 239; Schalck v. Harmon, 6 Minn. 265, 270 (Gil. 176).

[67] Wallace v. Fitzsimmons, 1 Dall. 248; Bohler v. Tappan, 1 Fed. 469; Miller v. Jones, 39 Ill. 54; People v. White, 11 Ill. 341; Merritt v. Dickey, 38 Mich. 41; Barry v. Briggs, 22 Mich. 201; Carrere v. Spofford, 46 How. Prac. (N. Y.) 294; McKay v. Joy, 70 Cal. 581, 11 Pac. 832. A surviving partner has no right to continue the partnership business longer than is necessary for winding up. Clay v. Field, 34 Fed. 375; Nelson v. Hayner, 66 Ill. 487; Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964; Grim's Appeal, 105 Pa. St. 375; Case v. Abeel, 1 Paige (N. Y.) 393; Brown v. Watson, 66 Mich. 223, 33 N. W. 493; Gable v. Williams, 59 Md. 46.

[68] McCartey v. Nixon, 2 Dall. 65, note; Connor v. Allen, Har. (Mich.) 371; Nelson v. Hayner, 66 Ill. 487; People v. White, 11 Ill. 341, 350; Jacquin v. Buisson, 11 How. Prac. (N. Y.) 385; Shields v. Fuller, 4 Wis. 102, 105. Assets of a partnership in the hands of the surviving partner at his death are so far his "personal estate," within the meaning of Mass. Pub. St. 1882, c. 135, § 2, that the probate court may make an allowance therefrom to his widow, although the assets are insufficient to pay the partnership creditors in full. Bush v. Clark, 127 Mass. 111.

viving, or, to speak more generally, the liquidating, partner, is not entitled, unless by prearrangement, to compensation for his services.[69]

179. NOTICE OF DISSOLUTION—A partner has a right to give notice of dissolution, and to have a co-partner, if necessary, co-operate in giving the notice.

Upon the happening of any event which, under the law or under the agreement of the partners, must precipitate the end of the relation, it lies with any one of the partners to give whatever notice of the dissolution may be requisite, "so that a stop may be put to the power of his co-partners to bind him."[70] And if he, in any case, cannot alone give a valid notice, he has the right to require that his co-partners act with him. Thus, in Troughton v. Hunter,[71] when one partner persisted in his refusal to sign such a notice, and the practice of the London Gazette office was to publish such notice only when signed by all the partners, it was decreed that the obstinate partner should do anything necessary towards having the notice published in the Gazette.

[69] Denver v. Roane, 99 U. S. 355; Schenkl v. Dana, 118 Mass. 236; Washburn v. Goodman, 17 Pick. (Mass.) 519; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Gyger's Appeal, 62 Pa. St. 73; Brown v. McFarland's Ex'r, 41 Pa. St. 129, 133; Com. v. Bracken (Ky.) 32 S. W. 609; Kimball v. Lincoln, 5 Ill. App. 316; A partner rendering services in excess of the mere winding up of the business of the partnership on dissolution by the death of his co-partner is entitled to compensation therefor. Richards v. Maynard, 61 Ill. App. 336. Where the surviving partner, with the concurrence of the executors of the deceased partner, carries on the business with a view to its sale as a going concern, but without any contract with them for remuneration, he is not, in the absence of a provision to that effect in the partnership articles, entitled to any allowance for his trouble, unless profits have been made. Aldridge v. Aldridge, 8 Reports, 189; Id. [1894] 2 Ch. 97. And see Jacksonville, M. P. Ry. & Nav. Co. v. Warriner, 35 Fla. 197, 16 South. 898; ante, p. 165.

[70] Lindl. Partn. 588. And see Troughton v. Hunter, 18 Beav. 470; Hendry v. Turner, 32 Ch. Div. 355.

[71] 18 Beav. 470.

180. SALE OF GOOD WILL—The good will of the business is partnership property, and on dissolution the partners have a right to have it sold, and its value protected until sale.

"The good will of a partnership, in so far as it has pecuniary value, is partnership property, unless the contrary can be shown." [72] Being thus assets, there is a right in each of the partners to have it reduced to such a form as to be applicable to the ends of the settlement of the firm affairs; that is, the payment of debts, and the distribution among the partners of the surplus left after such payment.[73] "That which the purchaser of the good will actually acquired as between himself and his vendor is," says Pollock, "the right to carry on the same business under the old name, * * * and to represent himself as the successors to that business." [74]

Protecting Value of Good Will until Sale.

After the settlement of the partnership business and the winding up of its affairs, any one of the partners is at liberty to use the firm

[72] Lindl. Partn. 327. See Dayton v. Wilkes, 17 How. Prac. (N. Y.) 510; Holden's Adm'r v. M'Makin, 1 Pars. Eq. Cas. (Pa.) 270; Bradbury v. Dickens, 27 Beav. 53; Pawsey v. Armstrong, 18 Ch. Div. 698. But see McCall v. Moschowitz, 10 N. Y. Civ. Proc. 107. Where, on the dissolution of a partnership, the exclusive use of the firm name is vested in one partner, the other may be enjoined from representing himself as its successor. Holbrook v. Nesbitt, 163 Mass. 120, 39 N. E. 794. Cf. U. S. Cordage Co. v. William Wall's Sons Rope Co., 90 Hun, 429, 35 N. Y. Supp. 978. But see Mason v. Dawson, 15 Misc. Rep. 595, 37 N. Y. Supp. 90.

[73] Holden's Adm'r v. M'Makin, 1 Pars. Eq. Cas. (Pa.) 270; Dougherty v. Van Nostrand, Hoff. Ch. (N. Y.) 68; Dayton v. Wilkes, 17 How. Prac. (N. Y.) 510; Snyder Manuf'g Co. v. Snyder (Ohio Supp.) 43 N. E. 325; Sheppard v. Boggs, 9 Neb. 257, 2 N. W. 370; Bradbury v. Dickens, 27 Beav. 53; Mellersh v. Keen, 28 Beav. 453; Austen v. Boys, 2 De Gex & J. 626. Secret processes of manufacture, trade-names which have been applied to the manufactured products, and trade-marks owned by the firm, are not subject of sale on dissolution of the firm, and thereafter each party may, in the absence of an agreement to the contrary, manufacture by such processes, and use such names and marks. (5 Misc. Rep. 386, 25 N. Y. Supp. 857, affirmed.) Baldwin v. Von Micheroux, 83 Hun, 43, 31 N. Y. Supp. 696.

[74] Pol. Partn. art. 57.

name in case there is no agreement to prevent his doing so,[75] subject, of course, to the right of any person whose name may appear plainly in the firm appellation to take such measures as shall preclude his being committed by the acts of the person so using the partnership name.[76] But this privilege of the partner accrues only after, and not before, such settlement on winding up; and the partner has the right to restrain his co-partner from using the name prematurely.[77] "This is maintained by Lord Justice Lindley, notwithstanding a certain amount of apparent authority to the contrary, as a necessary consequence of the principles stated in the last article.[78] If any partner who may require it has the right to have the good will sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the good will of all salable value. There is express authority to show that, while a liquidation of partnership affairs is pending, one partner must not use the name or property of the partnership to carry on business on his own account, since it is the duty of every partner to do nothing to prejudice the salable value of the partnership property until the sale." [79]

181. PAYMENT OF FIRM DEBTS—Upon dissolution the partners have a right to have the firm property applied to the payment of firm debts.

It is unnecessary to say that the creditor of a partnership is interested, not so much in the sum from which payment comes to him, as in the fact of his being paid at all. Indeed, when he is paid, his interest in the matter ceases altogether, he not being concerned as to whether the firm as a whole, or as an individual partner, provided the money for the purpose. It is of very great importance to a partner, however, as to how the partnership debts are to be paid, and the right is his to require that they be paid by the firm, so that no peril may come to his separate property; that is, if they can be so paid, for, if they cannot, then recourse is to be had to sepa-

[75] Staatts v. Howlett, 4 Denio (N. Y.) 559; Levy v. Walker, 10 Ch. Div. 436, 445.

[76] See ante, p. 80.

[77] Dayton v. Wilkes, 17 How. Prac. (N. Y.) 510; Turner v. Major, 3 Giff. 442.

[78] Article 57.

[79] Pol. Partn. art. 58.

rate property, whether partners desire it or not. If the partnership as a partnership is solvent, there is, of course, no reason why all its debts should not be paid out of the common property. This right of a partner is called a "partner's equity," because it does not exist at law,[80] but may be insisted on, as against a creditor at least, only when the estate is being administered under direction of a court having equity powers. A partner's lien has, however, already been discussed,[81] as has also the distribution of firm and separate property among the creditors of the partnership and of the individual partners.[82]

182. EARNINGS AFTER DISSOLUTION—When the capital of a retiring or deceased partner is not withdrawn, the continuing partners must pay, for the use of such capital, its estimated earnings.

In cases where one partner has retired or died, and there has been no formal settlement had in consequence, nor any withdrawal of his proportion of capital, the remaining partners continuing the business, such retiring partner, or the representative of the partner so dying, will be allowed by the court so much of the profits made since the dissolution as seems to be attributable to the capital so failed to be withdrawn, except, of course, when it has been otherwise paid.[83] "How far the profits made since the dissolution are attributable to the outgoing partner's capital is a question to be determined with regard to the nature of the business, the amount of capital from time to time employed in it, and the conduct of the parties generally. There is no fixed rule that the profits are divisible in the same manner as if the partnership had not ceased." [84]

When, in the articles, it is provided that any partner shall have

[80] Meech v. Allen, 17 N. Y. 301.

[81] Ante, p. 179.

[82] Ante, p. 273.

[83] Brown v. De Tastet, Jac. 284; Smith v. Everett, 27 Beav. 446; Featherstonhaugh v. Turner, 25 Beav. 382; Booth v. Parks, 1 Moll. 465; Yates v. Finn, 13 Ch. Div. 839.

[84] Pol. Partn. 60.

the right to purchase the interest of a co-partner who might die or retire, a partner who avails himself of this right, upon the happening of the emergency, must account, under this rule, to the retiring partner, or to the representatives of the deceased partner, if he fails to observe strictly the intention of the provision.[85] Again, one who has accepted the office of executor of his deceased partner, and continues the business, retaining in it his decedent's interest, must account, under this rule, to the persons entitled eventually to the estate.[86] When, in such a case as the last, the surviving partner associated others with him, in continuing the business, as co-partners, all were held liable jointly to the residuary legatee, the new partners not as partners, but as having knowingly lent themselves to the breach of trust.[87]

183. DISPOSITION OF SURPLUS PROPERTY — After payment of the firm debts and advances, the surplus property remaining is distributed among the partners in proportion to their shares in the firm.

Upon the dissolution of a partnership, if the firm is solvent, the surplus property remaining after the payment of the partnership debts belongs to the partners. Before this property can be distributed among the partners, any advances made by a partner to the firm must be repaid.[88] Such advances are in reality firm debts,

85 Heath v. Waters, 40 Mich. 457; Holmes' Appeal, 79 Pa. St. 279; Vyse v. Foster, L. R. 7 H. L. 318. Cf. Ogden v. Astor, 4 Sandf. (N. Y.) 311; Kimball v. Lincoln, 99 Ill. 578; Valentine v. Wysor, 123 Ind. 47, 23 N. E. 1076.

86 Cook v. Collingridge, Jac. 607; Townend v. Townend, 1 Giff. 201; Macdonald v. Richardson, Id. 81; Flockton v. Bunning, 8 Ch. App. 323, note. See Hunter v. Dowling [1895] 2 Ch. 223.

87 Flockton v. Bunning, 8 Ch. App. 323, note. And see Vyse v. Foster, L. R. 7 H. L. 318; Stroud v. Gwyer, 28 Beav. 130.

88 See 2 Bates, Partn. § 811, for the order of distribution. Where the amount of advances made by a partner to the firm is paid by him out of firm funds, the debt is satisfied; the contention that, because he was entitled to one-half of the firm funds, he only received from the firm one-half of the debt, being untenable. Thompson v. Beck (Nev.) 40 Pac. 516. Where, on accounting, it appears that the two partners were to advance capital, and share the profits equally, the amount advanced by one partner in excess of another should first be given him out of

though, as has been seen, partners are postponed to other creditors of the firm when it is insolvent. The balance remaining represents the value of the interests of the several partners in the firm, and the property is to be distributed among them in proportion to their shares in the partnership.[89] The rules for determining what each partner's share is have already been discussed.[90]

the assets, and then the balance divided equally between them. Chamberlain v. Sawyers (Ky.) 32 S. W. 475. The excess of one partner's advances over those of the other constitutes a preferred claim upon the partnership property, or its proceeds. Matthews v. Adams (Md.) 33 Atl. 645.

[89] Capital is to be repaid before dividing profits. Rowland v. Miller, 7 Phila. (Pa.) 362; Marquand v. Manufacturing Co., 17 Johns. (N. Y.) 525; Livingston v. Blanchard, 130 Mass. 341; Gunnell v. Bird, 10 Wall. 304; Jackson v. Crapp, 32 Ind. 422; Keaton v. Mayo, 71 Ga. 649. Where the contract of partnership formed for two years makes no provision for settlement on dissolution, on the death of one member three months after making the contract the survivor cannot maintain an action against the estate of decedent for the whole consideration paid by such survivor for the contract. Petrie v. Steedly, 94 Ga. 196, 21 S. E. 512.

[90] Ante, p. 132.

CHAPTER X.

LIMITED PARTNERSHIPS.

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GENERAL NATURE—DEFINITIONS.

184. "A limited partnership is a partnership in which the liability of some of its members to bear losses is restricted to a defined amount. As such an immunity is utterly repudiated in the common law, these associations are wholly statutory."

185. A special partner is a member of a limited partnership whose liability is limited. All the other members are called general partners.

The above definition is taken from Bates.[1] Another admirable definition is given by Parsons:[2] "A 'limited partnership,' in the present sense of the phrase, is one in which one or more of the partners are so in the usual way, in respect to power, property, and obligation, and one or more of them have placed a certain sum in the business, and may lose that, but are not liable further." The phrase "limited partnership" has come to be almost universally applied to designate this class of associations, although the term "special partnership" is used in the same sense in the statutes of a few states.[3] Care should be taken not to confuse the term "special partnership," used in this sense, with the more common use of the term to designate partnerships created for a single transaction or adventure, sometimes called "particular partnerships," as already explained.[4] So, also, the term "special partner" should always be used to mean a member of a limited partnership with a limited liability. It must not be supposed that the members of a "special partnership," using the term in its ordinary sense, are necessarily "special partners." All the members of a special partnership may be general partners, and in fact are such unless the special partnership is also a limited one.

[1] Bates, Lim. Partn. § 1. [2] T. Pars. Partn. § 421.

[3] CALIFORNIA: Civ. Code, § 2477 et seq. DAKOTA: Comp. Laws 1887, § 4072. NORTH DAKOTA: Rev. Code 1895, § 4416. OHIO: Rev. St. 1892, § 3161. WYOMING: Rev. St. 1887, § 4069.

[4] Ante, p. 88.

Origin and Purpose of Limited Partnerships.

Limited partnerships were unknown to the common law, and have never been adopted in England except in the form of joint-stock companies. On the continent of Europe, however, they have existed ever since mediæval times. The system was first introduced into this country by a statute of New York, which was copied substantially from the French Code of Commerce. The system found a ready acceptance in this country, and statutes providing for the formation of limited partnerships are found in most, if not all, the states and territories. The ancient history of limited partnerships is interestingly given in a New York case as follows:[5] "The system of limited partnerships, which was introduced by statute into this state, and subsequently very generally adopted in many other states of the Union, was borrowed from the French Code.* Under the name of 'la société en commandite,' it has existed in France from

[5] Ames v. Downing, 1 Bradf. (N. Y.) 321.

* 3 Kent, Comm. 36; Code de Com. 19, 23, 24. The theory on which limited partnerships are established was well stated in King v. Sarria, 69 N. Y. 24, as follows: "Indeed, it is as agent that the power of one partner to bind his co-partner is obtained and exercised. The law of partnership is a branch of the law of principal and agent. Cox v. Hickman, 8 H. L. Cas. 268; Baring v. Lyman, 1 Story, 396 [Fed. Cas. No. 983]; Worrall v. Munn, 5 N. Y. 229. In the case first above cited,—[Hawken v. Bourne] 8 Mees. & W. 703,—it is added that any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one partner possesses as the general agent of the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. It is manifest, however, that this remark is to be qualified, when taken in connection with any statute law, which has provided for the formation of limited partnerships, where that statute law is operative. A due observance of such statutory provisions limits the liability of the special partner. It limits, too, the authority of the general partner, as the agent of the special partner, and fixes beforehand the extent to which, as agent, he may bind the special partner. It is hardly necessary to say that when a limited partnership is duly formed and carried on under our statute, though the general partner is the agent for all the partners, with powers full enough to transact all the business of the firm, and to bind it to all contracts within the scope of that business, he gets no authority, from his relation as partner and agent of the special member of the firm, to fix upon him greater liability than that which has been stipulated for. These principles are stated here, not as new or forgotten by any one, but as the basis upon which the determination of this case will rest."

the time of the Middle Ages, mention being made of it in the most authentic commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the Middle Ages it was styled 'commenda,' and in Italy 'accommenda.' In the statutes of Pisa and Florence, it is recognized so far back as the year 1166; also, in the ordinance of Louis le Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva, of 1588. In the Middle Ages it was one of the most frequent combinations of trade, and was the basis of the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even traveled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the commons into position as an influential estate in the commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract of such ancient origin, but so recently introduced where the general partnership, known to the common law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be 'Societas mercatorem qua uni sociorum tota negotiationis cura commendatur, certis conditionibus.' It was always considered a proper partnership ('societas'), with certain reserves and restrictions; and in the ordinance of Louis XIV., of 1673, it is ranked as a regular partnership. In the Code of Commerce it is classed in the same manner."

The purpose of the law in permitting limited partnership has been

stated by various authorities as follows: "It is to encourage and facilitate trade and commerce, and induce capitalists to embark their capital therein, or a certain part of their capital, by relieving them from the peril, hanging over all partnership by the common law merchant, of losing not only all they have in the trade, but all they have besides." [6] "The object is to enable the capitalist to employ his wealth in trade without risking more than he originally subscribed, and at the same time to secure the co-operation of men of integrity and ability, but without means." [7] The object is "to encourage the employment of capital, without personal activity on the part of its owners, by associating it with industry and enterprise which might not be possessed of capital." [8] "For many years it has been deemed desirable for the benefit of trade, and to aid young men of integrity and capacity, but without means, that these limited partnerships should be formed." [9] A limited partnership is essentially a union of labor and capital.[10] According to Bates,[11] the object is "the bringing into co-operation, for mutual and public benefit, men having capital, and willing to risk a limited amount of it, provided the hazards of the enterprise would not involve their private fortunes beyond a calculable decree, and men without capital, but with enterprise, skill, and capacity, and thus develop the industrial prosperity of the country by enlisting the energy and diligence of the young with the dormant accumulations of the more advanced."

ESTABLISHMENT OF RELATION.

186. A limited partnership cannot exist unless authorized by statute.

187. In addition to the essentials of an ordinary partnership, all the requirements of the statute must be observed.

188. The general purpose underlying the various statutory provisions is the protection of persons who deal with the firm. The provisions relating to the forma-

[6] T Pars. Partn. § 421.
[7] 13 Am. & Eng. Enc. Law, 106.
[8] Singer v. Kelly, 44 Pa. St. 145, 149.
[9] Riper v. Poppenhausen, 43 N. Y. 68, 73.
[10] Levi, Merc. Law, 215.
[11] Lim. Partn. § 10.

tion of the partnership will be treated under the following heads:

(a) Purposes (p. 423).
(b) Members, general and special (p. 428).
(c) Certificate (p. 429).
(d) Affidavit (p. 441).
(e) Contribution of special partner (p. 442).
(f) Name and sign of firm (p. 445).

Construction of Statutes.

The idea of limiting one partner's liability to such a sum as he is willing to invest in the business is wholly repugnant to the common law. The possibility of doing so therefore rests solely on statute. Unless the statutory requirements are substantially complied with, a limited partnership is not formed, and all the partners are liable as general partners in ordinary partnerships. The statutes must be construed with reference to the common law, which has been said to be "the strong enemy of limited partnerships." [12] But the courts are not agreed as to whether the statutes should be construed strictly or liberally. Thus, on the one hand, it is said that the statutes should be strictly construed, because in derogation of the common law.[13] "The parties cannot claim under the stat-

[12] Jacquin v. Buisson, 11 How. Prac. (N. Y.) 385, 393.

[13] Durant v. Abendrath, 41 N. Y. Super. Ct. 53, 59; Henkel v. Heyman, 91 Ill. 96; Pears v. Barnes (Pa.) 1 Atl. 658; Pierce v. Bryant, 5 Allen (Mass.) 91. The object of the statute in providing for the formation of limited partnerships was to compel those who claim the benefits of its exemptions to give public notice of the terms of the partnership, that all who deal with it may know the extent of the credit and liability which it assumes. It was also intended for the mutual protection of the special partner and those dealing with him, and should be construed in the spirit with which it was framed. All that the law requires in the formation of a limited partnership is a substantial compliance with its provisions. The filing of the certificate and affidavit required, 28 days after they were executed, could not affect the validity of the partnership as to those who dealt with it after the date of such filing. Levy v. Lock, 47 How. (N. Y.) 394. Where a special partnership was attempted to be formed according to the statute, but in one of the newspapers in which the terms were published the sum contributed by the special partner was, by mistake of the printer, stated at $5,000, instead of $2,000, which was the true sum mentioned in the certificate, *held*, that the associates were all liable as general partners. Argall v. Smith, 3 Denio (N. Y.) 435.

ute, which derogates from the general rule of law, without showing a strict compliance with the statute." [14] On the other hand, the statutes have been considered as remedial in their nature and entitled to a liberal construction. Thus, the New York court of appeals said: "This may well be regarded as a remedial statute, and it should receive a liberal construction, with a view 'to suppress the mischief and advance the remedy.'" [15] Generally, a substantial compliance with the statute is all that is required, though some courts say that the compliance must be strict, and some both strict and substantial.[16] Bates suggests [17] that the statutes are framed with a double object: (1) To induce the investment of capital in business; and (2) the protection of persons dealing with the firm,—and that the "provisions for the protection of third persons are to be liberally construed in favor of such persons, which means strictly against the special partner; and provisions which cannot affect the rights of third persons will be liberally construed, so as not to forfeit the protection of the statute without reason."

SAME—PURPOSES.

189. Limited partnerships can be formed only to engage in businesses authorized by statute. The statutory authority is usually confined to a mercantile, mechanical, or manufacturing business.

190. Nearly all the statutes prohibit limited partnerships from engaging in insurance or banking.

[14] In re Merrill, 12 Blatchf. 221, Fed. Cas. No. 9,467.

[15] Riper v. Poppenhausen, 43 N. Y. 68, 73. And see Johnson v. McDonald, 2 Abb. Prac. (N. Y.) 290; Bowen v. Argall, 24 Wend. (N. Y.) 496; Clapp v. Lacey, 35 Conn. 463; Pfirmann v. Henkel, 1 Ill. App. 145.

[16] Holliday v. Paper Co., 3 Colo. 342; Argall v. Smith, 3 Denio (N. Y.) 435; Levy v. Lock, 47 How. Prac. (N. Y.) 394.

[17] Lim. Partn. § 13.

Authorized Businesses.

Limited partnerships may, in the several states, be formed for any mercantile business;[18] for any mechanical business;[19] for any manufacturing business.[20] These are the most common statutory

[18] ALABAMA: Code 1886, § 1705. ARKANSAS: Sand. & H. Dig. 1894, § 5447. DELAWARE: Rev. Code 1893, c. 64, § 1. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 1. FLORIDA: McClel. Dig. 1881, p. 796, § 1. GEORGIA: Code 1882, § 1920. KANSAS: Gen. St. 1889, par. 3977. KENTUCKY: St. 1894, c. 94, § 3767. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 1. MICHIGAN: How. Ann. St. 1882, § 2341. MINNESOTA: Gen. St. 1894, § 2330. MISSISSIPPI: Code 1892, § 2764. MISSOURI: Rev. St. 1889, § 7195. NEBRASKA: Comp. St. 1893, p. 1, c. 65, § 1. NEVADA: Gen. St. 1885, § 4905. NEW JERSEY: Gen. St. 1895, p. 2437, "Partnership," § 1. NEW YORK: Rev. St. (9th Ed.) p. 1843, § 1. NORTH CAROLINA: Code 1883, § 3088. OHIO: Rev. St. 1892, § 3141. OREGON: Hill's Ann. Laws 1892, § 3848. PENNSYLVANIA: Pepper & L. Dig. p. 2687, "Limited Partnership," § 1. RHODE ISLAND: Gen. Laws 1896, c. 157, § 1. SOUTH CAROLINA: Rev. St. 1893, § 1407. TENNESSEE: Mill. & V. Code 1884, § 2399. TEXAS: Rev. St. 1895, art. 3583. UTAH: Comp. Laws 1888, § 2473. VERMONT. St. 1894, § 4276. VIRGINIA: Code 1887, c. 135, § 2863. WASHINGTON: Hill's Code 1891, § 2917. WEST VIRGINIA: Code 1891, c. 100, § 1. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1703.

[19] ALABAMA: Code 1886, § 1705. ARKANSAS: Sand. & H. Dig. 1894, § 5447. DELAWARE: Rev. Code 1893, c. 64, § 1. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 1. FLORIDA: McClel. Dig. 1881, p. 796, § 1. GEORGIA: Code 1882, § 1920. KANSAS: Gen. St. 1889, par. 3977. KENTUCKY: St. 1894, c. 94, § 3767. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 1. MICHIGAN: How. Ann. St. 1882, § 2341. MINNESOTA: Gen. St. 1894, § 2330. MISSOURI: Rev. St. 1889, § 7195. NEBRASKA: Comp. St. 1893, c. 65, § 1. NEVADA: Gen. St. 1885, § 4905. NEW JERSEY: Gen. St. 1895, p. 2437, "Partnership," § 1. NEW YORK: Rev. St. (9th Ed.) p. 1843, § 1. NORTH CAROLINA: Code 1883, § 3088. OHIO: Rev. St. 1892, § 3141. OREGON: Hill's Ann. Laws 1892, § 3848. PENNSYLVANIA: Pepper & L. Dig. p. 2687, "Limited Partnership," § 1. RHODE ISLAND: Gen. Laws 1896, c. 157, § 1. SOUTH CAROLINA: Rev. St. 1893, § 1407. TENNESSEE: Mill & V. Code 1884, § 2399. TEXAS: Rev. St. 1895, art. 3583. UTAH: Comp. Laws 1888, § 2473. VERMONT: St. 1894, § 4276. VIRGINIA: Code 1887, § 2863. WASHINGTON: Hill's Ann. Code 1891, § 2917. WEST VIRGINIA: Code 1891, c. 100, § 1. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1703.

[20] ALABAMA: Code 1886, § 1705. ARKANSAS: Sand. & H. Dig. 1894, § 5447. DELAWARE: Laws 1893, c. 64, § 1. DISTRICT OF COLUMBIA

provisions. In one or more states, limited partnerships are authorized to engage in the following businesses: Any commercial business;[21] mining;[22] transportation[23] (in Pennsylvania, of coal only[24]); agricultural business;[25] "any work of improvement";[26] construction of roads, railways, canals, etc.;[27] or for any lawful trade or business.[28]

Comp. St. 1894, c. 43, § 1. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1920. KANSAS: Gen. St. 1889, par. 3977. KENTUCKY: St. 1894, c. 94, § 3767. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 1. MICHIGAN: How. Ann. St. 1882, § 2341. MINNESOTA: Gen. St. 1894, § 2330. MISSISSIPPI: Code 1892, § 2764. MISSOURI: Rev. St. 1889, § 7195. NEBRASKA: Comp. St. 1893, c. 65, § 1. NEVADA: Gen. St. 1885, § 4905. NEW JERSEY: Gen. St. 1895, p. 2437, § 1. NEW YORK: Rev. St. (9th Ed.) p. 1843, § 1. NORTH CAROLINA: Code 1883, § 3088. OHIO: Rev. St. 1892, § 3141. OREGON: Hill's Ann. Laws 1892, § 3848. PENNSYLVANIA: Pepper & L. Dig., "Limited Partnership," § 1. RHODE ISLAND: Gen. Laws 1896, c. 157, § 1. SOUTH CAROLINA: Rev. St. 1893, § 1407. TENNESSEE: Mill. & V. Code 1884, § 2399. TEXAS: Rev. St. 1895, art. 3583. UTAH: Comp. Laws 1888, § 2473. VERMONT: St. 1894, § 4276. VIRGINIA: Code 1887, § 2863. WASHINGTON: Hill's Ann. Code 1891, § 2917. WEST VIRGINIA: Code 1891, c. 100, § 1. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1703.

[21] ARKANSAS: Sand. & H. Dig. 1894, § 5473. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1920. MISSISSIPPI: Code 1892, § 2764.

[22] GEORGIA: Code 1882, § 1920. KENTUCKY: St. 1894, c. 94, § 3767. MISSOURI: Rev. St. 1889, § 7195. NEVADA: Gen. St. 1885, § 4905. OHIO: Rev. St. 1892, § 3141. PENNSYLVANIA: Pepper & L. Dig., "Limited Partnership," § 1. TENNESSEE: Mill. & V. Code 1884, § 2399. UTAH: Comp. Laws 1888, § 2473.

[23] MISSOURI: Rev. St. 1889, § 7195. SOUTH CAROLINA: Rev. St. 1893, § 1407.

[24] Pepper & L. Dig., "Limited Partnership," § 1.

[25] FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1920. KENTUCKY: St. 1894, c. 94, § 3767. MISSOURI: Rev. St. 1889, § 7195. PENNSYLVANIA: Pepper & L. Dig., "Limited Partnership," § 1. TENNESSEE: Mill. & V. Code 1884, § 2399.

[26] MISSISSIPPI: Code 1892, § 2764.

[27] ARKANSAS: Sand. & H. Dig. 1894, § 5473.

[28] CALIFORNIA: Civ. Code 1886, § 2477. COLORADO: Mills' Ann. St. 1891, § 3369. CONNECTICUT: Gen. St. 1888, § 3276. DAKOTA: Comp. Laws 1887, § 4072. IDAHO: Rev. St. 1887, § 3270. INDIANA: Rev. St. 1894, § 8109. IOWA: McCLAIN's Code, 1888, § 3330. MASSACHUSETTS:

Prohibited Businesses.

Limited partnerships are very generally prohibited from carrying on a banking business,[29] a brokerage business,[30] and an insurance business.[31] In Arkansas, however, they are authorized to engage

Pub. St. 1882, c. 75, § 1. NEW YORK: Rev. St. (9th Ed.) p. 1843, § 1. NORTH DAKOTA: Rev. Code 1895, § 4416. TEXAS: Rev. St. 1895, art. 3583. WYOMING: Rev. St. 1887, § 4069. See Benedict v. Van Allen, 17 U. C. Q. B. 234, for a case where the purpose of the partnership was held not sufficiently described by the term "general business." There is no material variance between the certificate of formation of a limited partnership, expressing the nature of the business to be "a general commission business, buying and selling grain, flour, and produce on commission," and the published notice, stating the business to be "for the purpose of conducting a general commission business." Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129.

[29] ALABAMA: Code 1886, § 1705. ARKANSAS: Sand. & H. Dig. 1894, § 5447. CALIFORNIA: Civ. Code 1886, § 2477. CONNECTICUT: Gen. St. 1888, § 3276. DAKOTA: Comp. Laws 1887, § 4072. DELAWARE: Rev. Code 1893, c. 64, § 1. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1920. IDAHO: Rev. St. 1887, § 3270. KANSAS: Gen. St. 1889, par. 3977. KENTUCKY: St. 1894, c. 94, § 3767. MAINE: Rev. St. 1883, c. 33, § 1. MICHIGAN: How. Ann. St. 1882, § 2341. MINNESOTA: Gen. St. 1894, § 2330. MISSOURI: Rev. St. 1889, § 7195. MONTANA: Civ. Code 1895, § 3290. NEBRASKA: Comp. St. 1893, c. 65, § 1. NEVADA: Gen. St. 1885, § 4905. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 1. NEW JERSEY: Gen. St. 1895, "Partnership," § 1. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 1. NORTH CAROLINA: Code 1883, § 3088. NORTH DAKOTA: Rev. Code 1895, § 4416. OHIO: Rev. St. 1892, § 3141. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 1. RHODE ISLAND: Gen. Laws 1896, c. 157, § 1. SOUTH CAROLINA: Rev. St. 1893, § 1407. TENNESSEE: Mill. & V. Code 1884, § 2399. TEXAS: Rev. St. 1895, art. 3583. UTAH: Comp. Laws 1888, § 2473. VERMONT: St. 1894, § 4276. VIRGINIA: Code 1887, § 2863. WEST VIRGINIA: Code 1891, c. 100, § 1. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1703. WYOMING: Rev. St. 1887, § 4069.

[30] KENTUCKY: St. 1894, c. 94, § 3767. MISSOURI: Rev. St. 1889, § 7195. VIRGINIA: Code 1887, § 2863. WEST VIRGINIA: Code 1891, c. 100, § 1.

[31] ALABAMA: Code 1886, § 1705. CALIFORNIA: Civ. Code 1886, § 2477. CONNECTICUT: Gen. St. 1888, § 3276. DAKOTA: Comp. Laws 1887, § 4072. DELAWARE: Rev. Code 1893, c. 64, § 1. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1920. IDAHO: Rev. St. 1887, § 3270. INDIANA: Rev. St. 1894, § 8109. KANSAS: Gen. St. 1889, par. 3977. KENTUCKY: St. 1894, c. 94, § 3767. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 1; Laws 1880, c. 483. MASSACHU-

in insurance business,[32] and in Maryland to engage in the banking business.[33] In Florida, limited partnerships cannot engage in the railroad or canal business.[34]

Effect of Engaging in Unauthorized Business.

Where a limited partnership is attempted to be formed for a purpose not authorized by statute, or for a purpose prohibited by statute, the result is that an ordinary or general partnership, and not a limited one, is formed. Thus, in McGehee v. Powell,[35] the parties attempted to form a limited partnership to transact a banking business. In Alabama, limited partnerships are prohibited from carrying on a banking business. The partners were held to be all general partners, and each liable in solido for the debts. The fact that the body is not a legal limited partnership does not affect the validity of its contracts. The only result is that all the partners are equally liable in solido.

Conflict of Laws.

Limited partnerships cannot usually be formed for the purpose of transacting business in another state. Indeed, most of the stat-

SETTS: Pub. St. 1882, c. 75, § 1. MICHIGAN: How. Ann. St. 1882, § 2341. MINNESOTA: Gen. St. 1894, § 2330. MISSOURI: Rev. St. 1889, § 7195. MONTANA: Civ. Code 1895, § 3290. NEBRASKA: Comp. St. 1893, c. 65, § 1. NEVADA: Gen. St. 1885, § 4905. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 1. NEW JERSEY: Gen. St. 1895, "Partnership," § 1. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 1. NORTH CAROLINA, Code 1883, § 3088. NORTH DAKOTA: Rev. Code 1895, § 4416. OHIO: Rev. St. 1892, § 3141. PENNSYLVANIA: Pepper & L. Dig. 1894 "Limited Partnership," § 1. RHODE ISLAND: Gen. Laws 1896, c. 157, § 1. SOUTH CAROLINA: Rev. St. 1893, § 1407. TENNESSEE: Mill & V. Code 1884, § 2399. TEXAS: Rev. St. 1895, art. 3583. UTAH: Comp. Laws 1888, § 2473. VERMONT: St. 1894, § 4276. VIRGINIA: Code 1887, § 2863. WEST VIRGINIA: Code 1891, c. 100, § 1. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1703. WYOMING: Rev. St. 1887, § 4069.

[32] ARKANSAS: Sand. & H. Dig. 1894, § 5473.

[33] MARYLAND: Code 1888, art. 73, § 1; Laws 1880, c. 482.

[34] FLORIDA: McClel. Dig. 1881, c. 159, § 1.

[35] 8 Ala. 827. Every one trading with a limited partnership is chargeable with notice as to the scope and range of the business of the partnership, and as set forth in the articles, when the same have been filed and made known according to law. Taylor v. Rasch, 1 Flip. 385, 11 N. B. R. 91, 1 Cent. Law J. 555, 31 Leg. Int. 365, Fed. Cas. No. 13,800.

utes, by their terms, only authorize such partnerships for the purpose of doing business in the state under whose laws they are organized. A firm formed for the purpose of doing business in another state would be a general partnership in both states. But a limited partnership carrying on business in the state under whose laws it was organized may have business transactions in other states.[36] In such cases, the liability of the special partner and the authority of general partners to bind him on contracts made in a foreign state will be determined by the laws of the state where the firm is located,[37] and the construction and enforcement of the contract and the nature and extent of the liability of the partnership will be determined by the laws of the state in which the contract was made.[38]

SAME—MEMBERS, GENERAL AND SPECIAL.

191. Limited partnerships must consist of both general and special partners. Some statutes regulate the number of each.

Limited partnerships consist of one or more (in Washington, two or more [39]) persons, who are general partners, and liable as such, and of one or more (in Washington, two or more, and in Maryland and the District of Columbia the number cannot exceed six [40]) persons who are special partners, and merely contribute capital to the common stock.[41]

[36] King v. Sarria, 69 N. Y. 24; Rosenberg v. Block, 50 N. Y. Super. Ct. 357; Lawrence v. Batcheller, 131 Mass. 504; Gray v. Gibson, 6 Mich. 300; Hastings v. Hopkinson, 28 Vt. 108.

[37] Locke v. Lewis, 124 Mass. 1; Lawrence v. Batcheller, 131 Mass. 504; King v. Sarria, 69 N. Y. 32; Gray v. Gibson, 6 Mich. 300; Hastings v. Hopkinson, 28 Vt. 108; Hogg v. Orgill, 34 Pa. St. 344; Taylor v. Webster, 39 N. J. Law, 102. And see Ward v. Newell, 42 Barb. (N. Y.) 482.

[38] Rosenberg v. Block, 50 N. Y. Super. Ct. 357; Jacquin v. Buisson, 11 How. Prac. (N. Y.) 385; Hogg v. Orgill, 34 Pa. St. 344; Barrows v. Downs, 9 R. I. 446. And see 13 Am. & Eng. Enc. Law, 819.

[39] WASHINGTON: Gen. St. 1891, § 2917.

[40] MARYLAND: Code 1888, art. 73, § 2.

[41] ALABAMA: Code 1886, § 1706. ARKANSAS: Sand. & H. Dig. 1894, § 5448. CALIFORNIA: Civ. Code, 1886, § 2478. COLORADO: Mills' Ann.

SAME—CERTIFICATE.

192. Persons forming a limited partnership must make and severally sign a certificate containing a statement of the facts required by statute.

The persons desirous of forming a limited partnership must make and severally sign a certificate which shall contain certain facts required by statute.[42] These facts are the following: (1) The name

St. 1891, § 3370. CONNECTICUT: Gen. St. 1888, § 3277. DAKOTA: Comp. Laws, 1887, § 4073. DELAWARE: Rev. Code 1893, c. 64, § 2. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 2. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1921. IDAHO: Rev. St. 1887, § 3271. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 2. INDIANA: Rev. St. 1894, § 8110. IOWA: McClain's Code 1888, § 3331. KANSAS: Gen. St. 1889, par. 3978. KENTUCKY: St. 1894, c. 94, § 3768. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 2. MASSACHUSETTS: Pub. St. 1882, c. 75, § 2. MINNESOTA: Gen. St. 1894, § 2331. MISSISSIPPI: Code 1892, § 2765. MONTANA: Civ. Code 1895, § 3291. NEBRASKA: Comp. St. 1893, c. 65, § 2. NEVADA: Gen. St. 1885, § 4906. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 1. NEW JERSEY: Gen. St. 1895, "Partnership," § 2. NEW YORK: Rev. St. (9th Ed.) p. 2, c. 4, tit. 1, § 2. NORTH CAROLINA: Code 1883, § 3089. NORTH DAKOTA: 1895, § 4417. OHIO: Rev. St. 1892, § 3142. OREGON: 2 Hill's Ann. Laws 1892, § 3849. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 2. RHODE ISLAND: Gen. Laws 1896, c. 157, § 2. SOUTH CAROLINA: Rev. St. 1893, § 1408. TEXAS: Rev. St. 1895, art. 3584. UTAH: Comp. Laws 1888, § 2474. VERMONT: St. 1894, § 4277. VIRGINIA: Code 1887, § 2864. WASHINGTON: Gen. St. 1891, § 2918. WEST VIRGINIA: Code 1891, c. 100, § 2. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1704. WYOMING: Rev. St. 1887, § 4070. An act which requires not less than three persons to unite to form a limited partnership is complied with where two of the persons uniting are married women, and the others are their husbands. Bernard & Leas Manuf'g Co. v. Packard & Calvin, 12 C. C. A. 123, 64 Fed. 309. A special partner cannot be made liable as a general partner because one of the general partners, under the contract of partnership, was an infant, where it does not appear that the infant has repudiated the contract, or attempted to avoid its obligations. Continental Nat. Bank v. Strauss (Super. N. Y.) 17 N. Y. Supp. 188, affirmed. Id., 137 N. Y. 148, 553, 32 N. E. 1066.

[42] ALABAMA: Code 1886, § 1708. CALIFORNIA: Civ. Code 1886, § 2479. COLORADO: Mills' Ann. St. 1891, § 3372. CONNECTICUT: Gen.

or firm under which such partnership is to be conducted (except in New Mexico [43]). (2) The general nature of the business to be conducted (except in Connecticut [44] and New Mexico,[45] and in New

St. 1888, § 3279. DAKOTA: Comp. Laws 1887, § 4074. DELAWARE: Rev. Code 1893, c. 64, § 3. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 5. FLORIDA: McClel. Dig. 1881, c. 159, § 2. GEORGIA: Code 1882, § 1923. IDAHO: Rev. St. 1887, § 3272. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 4. INDIANA: Rev. St. 1894, § 8111. IOWA: McClain's Code 1888, § 3333. KANSAS: Gen. St. 1889, par. 3980. MAINE: Rev. St. 1883, c. 33, § 2. MARYLAND: Code 1888, art. 73, § 3. MASSACHUSETTS: Pub. St. 1882, c. 75, § 4. MICHIGAN: How. Ann. St. 1882, § 2344. MINNESOTA: Gen. St. 1894, § 2333. MISSISSIPPI: Code 1892, § 2766. MONTANA: Civ. Code 1895, § 3292. NEBRASKA: Comp. St. 1893, c. 65, § 4. NEVADA: Gen. St. 1885, § 4907. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 3. NEW JERSEY: Gen. St. 1895, "Partnership," § 4. NEW MEXICO: Comp. Laws 1884, § 1801. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 4. NORTH DAKOTA: Rev. Code 1895, § 4418. OHIO: Rev. St. 1892, § 3143. OREGON: 2 Hill's Ann. Laws 1892, § 3850. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 5. RHODE ISLAND: Gen. Laws 1896, c. 157, § 3. SOUTH CAROLINA: Rev. St. 1893, § 1410. UTAH: Comp. Laws 1888, § 2476. VERMONT: St. 1894, § 4278. VIRGINIA: Code 1887, § 2865. WASHINGTON: Gen. St. 1891, § 2919. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1705. WYOMING: Rev. St. 1887, § 4071. The articles of association, with accompanying schedules, required by the limited partnership act, should conform fully to all its provisions, and be self-explanatory and self-sustaining, and cannot be supplemented or amended by oral testimony. Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045. The removal of the place of business of a "limited partnership" from the county where it was established, and where the certificate required by the statute has been duly filed in the county clerk's office, to another county, and the continuance of business there, without filing in the clerk's office of that county any new certificate, renders it a general partnership, and the special partners liable as general partners. Van Riper v. Poppenhausen, 43 N. Y. 68. The certificate of the formation of a limited partnership declared "that all the general partners interested therein are A. and B., both of Brooklyn, in the state of New York, and that the special partner interested therein is C., of Jersey City, in the state of New Jersey." *Held*, that this was a compliance with the statute requiring the certificate to contain the respective places of residence of the general and special partners, and that no more distinct averment of residence was required. (2 Rev. St. [4th Ed.] p. 174, § 4, subd. 3; 2 Rev. St. [9th Ed.] p. 1844, § 4, subd. 3). Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610.

[43] Comp. Laws 1884, § 1801. [44] Gen. St. 1888, § 3279.

[45] Comp. Laws 1884, § 1801.

Hampshire,[46] Virginia,[47] Kentucky,[48] Missouri,[49] and Colorado [50] it must state the place where the business is to be carried on). (3) The names, Christian and surname, and places of residence, of all the general and special partners interested therein, distinguishing (in all except Oregon,[51] Washington,[52] Idaho,[53] and New Mexico [54]) which are general and special (and also in Connecticut [55] and Florida [56] designating which of the general partners are authorized to transact business and sign the firm name). (4) The amount of capital which each partner has contributed to the common stock (and in Florida [57] "the nature of such capital, whether in cash, merchandise, or business experience and skill," and in Missouri [58] the amount he has agreed to contribute, but which is yet unpaid). (5) The periods at which the partnership is to commence and terminate. The facts are almost universally required to be stated in the certificate. In some states additional facts must be stated. Thus, in Missouri [59] and New Mexico [60] the amount of means each special partner may annually withdraw for his individual use from the partnership must be stated. In New Mexico [61] the certificate must also state the administration or branches in which each one shall act, the manner in which they shall divide profits or losses, an agreement that the partners will submit under a conventional penalty to the adjudication of arbitrators without appeal, and such other conditions as may be desired. This contract or certificate is required in all partnerships, general or limited, in New Mexico.[62] In Illinois [63] the certificate may provide the terms upon which the partnership may be dissolved, and that the death of any shall not work a dissolution. In Georgia [64] the certificate may be signed by power of attorney, which must be duly recorded with it.

[46] Pub. St. 1891, c. 122, § 3.
[47] Code 1887, § 2865.
[48] St. 1894, c. 94, § 3769.
[49] Rev. St. 1889, § 7197.
[50] Mills' Ann. St. 1891, § 3372.
[51] 2 Hill's Ann. Laws 1892, § 3850.
[52] Gen. St. 1891, § 2919.
[53] Rev. St. 1887, § 3272.
[54] Comp. Laws 1884, § 1801.
[55] Gen. St. 1888, § 3279.
[56] McClel. Dig. 1881, c. 159, § 2.
[57] McClel. Dig. 1881, c. 159, § 2.
[58] Rev. St. 1889, § 7197.
[59] Rev. St. 1889, § 7197.
[60] Comp. Laws 1884, § 1801.
[61] Comp. Laws 1884, § 1801.
[62] Comp. Laws 1884, § 1801.
[63] 2 Starr & C. Ann. St. 1896, c. 84, § 4.
[64] Code 1882, § 1923.

193. ACKNOWLEDGMENT AND PROOF—In most states the certificate must be acknowledged before a proper officer by the persons signing it.

In most states the several persons signing the certificate must acknowledge it (or their signatures may be proved as in the case of a deed) before the same persons authorized to take acknowledgment or proof of deeds of land.[65] Some statutes authorize the acknowledgment to be before any justice of the peace,[66] or a notary public,[67] or a clerk of court,[68] or court of record,[69] or any chancellor or judge of the supreme, circuit, or county courts.[70] The ac-

[65] CALIFORNIA: Civ. Code 1886, § 2480. COLORADO: Mills' Ann. St. 1891, § 3373. CONNECTICUT: Gen. St. 1888, § 3279. DAKOTA: Comp. Laws 1887, § 4075. FLORIDA: McClel. Dig. 1881, c. 159, § 3. IDAHO: Rev. St. 1887, § 3273. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 5. IOWA: McClain's Code 1888, § 3334. KANSAS: Gen. St. 1889, par. 3981. KENTUCKY: St. 1894, c. 94, § 3770. MARYLAND: Code 1888, art. 73, § 4; Laws 1884, c. 65. MASSACHUSETTS: Pub. St. 1882, c. 75, § 5. MICHIGAN: How. Ann. St. 1882, § 2345. MINNESOTA: Gen. St. 1894, § 2334. MISSISSIPPI: Code 1892, § 2767. MISSOURI: Rev. St. 1889, § 7198. MONTANA: Civ. Code 1895, § 3293. NEBRASKA: Comp. St. 1893, c. 65, § 5. NEVADA: Gen. St. 1885, § 4908. NEW JERSEY: Gen. St. 1895, "Partnership," § 5. NEW YORK: Laws 1837, c. 129. NORTH DAKOTA: Rev. Code 1895, § 4419. OHIO: Rev. St. 1892, § 3144. OREGON: 2 Hill's Ann. Laws 1892, § 3850. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 5. SOUTH CAROLINA: Rev. St. 1893, § 1411. TENNESSEE: Mill & V. Code 1884, § 2402. TEXAS: Rev. St. 1895, art. 3587. UTAH: Comp. Laws 1888, § 2477. WASHINGTON: Gen. St. 1891, § 2919. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1706. WYOMING: Rev. St. 1887, § 4072.

[66] ARKANSAS: Sand. & H. Dig. 1894, § 5451. DELAWARE: Rev. Code 1893, c. 64, § 3. GEORGIA: Code 1882, § 1924. INDIANA: Rev. St. 1894, § 8112. MAINE: Rev. St. 1883, c. 33, § 3. MARYLAND: Code 1888, art. 73, § 4. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 4. RHODE ISLAND: Gen. Laws, 1896, c. 157, § 4. VERMONT: St. 1894, § 4279.

[67] DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 6. GEORGIA: Code 1882, § 1924. NEBRASKA: Comp. St. 1893, c. 65, § 5. RHODE ISLAND: Gen. Laws 1896, c. 157, § 4. UTAH: Comp. Laws 1888, § 2477.

[68] KENTUCKY: St. 1894, c. 94, § 3770. NORTH CAROLINA: Code 1883, § 3091.

[69] NEW MEXICO: Comp. Laws 1884, § 1801.

[70] NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 5.

knowledgment is generally to be made in the same manner as in the case of a deed conveying lands.[71] In Virginia and West Virginia it is to be acknowledged as in the case of a power of attorney.[72] In Florida it must be proved by two witnesses.[73]

194. RECORD—The certificate must be recorded.

The certificate so made is to be recorded in some states in the land-record office of the county or town wherein is situated the chief place of business of the partnership.[74] In some states it is to be recorded in the office of the county clerk in such county.[75] In

[71] ARKANSAS: Sand. & H. Dig. 1894, § 5451. COLORADO: Mills' Ann. St. 1891, § 3373. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 6. FLORIDA: McClel. Dig. 1881, c. 159, § 3. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 5. KANSAS: Gen. St. 1889, par. 3981. KENTUCKY: St. 1894, c. 94, § 3770. MARYLAND: Code 1888, art. 73, § 4; Laws 1884, c. 65. MICHIGAN: How. Ann. St. 1882, § 2345. MINNESOTA: Gen. St. 1894, § 2334. MISSISSIPPI: Code 1892, § 2767. MISSOURI: Rev. St. 1889, § 7198. NEBRASKA: Cobbey's Consol. St. 1891, § 3235. NEW JERSEY: Gen. St. 1895, "Partnership," § 5. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 5. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 6. SOUTH CAROLINA: Rev. St. 1893, § 1411. TENNESSEE: Mill. & V. 1884, § 2402. TEXAS: Rev. St. 1895, art. 3587. UTAH: Comp. Laws 1888, § 2477.

[72] VIRGINIA: Code 1873, c. 142, § 4. WEST VIRGINIA: Code 1891, c. 100, § 4.

[73] McClel. Dig. 1881, c. 159, § 3.

[74] CALIFORNIA: Civ. Code 1886, § 2480. DELAWARE: Rev. Code 1893, c. 64, § 3. IDAHO: Rev. St. 1887, § 3273. INDIANA: Rev. St. 1894, § 8112. MAINE: Rev. St. 1883, c. 33, § 3. MINNESOTA: Gen. St. 1894, § 2335. MISSOURI: Rev. St. 1889, § 7198. MONTANA: Civ. Code 1895, § 3293. NEVADA: Gen. St. 1885, § 4908. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 4. NORTH CAROLINA: Code 1883, § 3092. OHIO: Rev. St. 1892, § 3145. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 6. TENNESSEE: Mill. § V. Code 1884, §§ 2402, 2403. UTAH: Comp. Laws 1888, § 2478. WYOMING: Rev. St. 1887, § 4072. Cf. Adam v. Musson, 37 Ill. App. 501. Though Rev. St. N. Y. (9th Ed.) pt. 2, c. 4, tit. 1, § 6, in relation to limited partnerships, provides that the certificate required by law to be made by those forming such partnership shall be recorded in the office of the county clerk, the failure of the clerk to record it, when it has been duly filed for record, does not render the members of the partnership liable as general partners. (Ruger, C. J., and Gray, J., dissenting.) Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712.

[75] COLORADO: Mills' Ann. St. 1891, § 3374. GEORGIA: Code 1882, §

Vermont,[76] Rhode Island,[77] and Connecticut [78] it should be recorded in the office of the town clerk. In some other states the record should be made in the office of the clerk of the circuit or superior court for the county.[79] In Massachusetts it is to be recorded with the secretary of state; [80] in Alabama with the judge of probate; [81] in Mississippi with the chancery clerk; [82] in District of Columbia with the clerk of the supreme court.[83] The record is made in books kept open to public inspection.[84] If the partnership shall have

1925. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 6. KANSAS: Gen. St. 1889, par. 3982. KENTUCKY: St. 1894, c. 94, § 3770. MICHIGAN: How. Ann. St. 1882, § 2346. NEBRASKA: Cobbey's Consol. St. 1891, § 3236. NEW JERSEY: Gen. St. 1895, "Partnership," § 6. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 6. OREGON: 2 Hill's Ann. Laws 1892, § 3850. SOUTH CAROLINA: Rev. St. 1893, § 1412. TEXAS: Rev. St. 1895, art. 3588. VIRGINIA: Code 1873, c. 142, § 4. WASHINGTON: Code 1891, §§ 2919, 2920. WEST VIRGINIA: Code 1891, c. 100, § 4; Laws 1883, c. 5. WYOMING: Rev. St. 1887, § 4072.

[76] St. 1894, § 4279.

[77] Gen. Laws 1896, c. 157, § 4.

[78] Gen. St. 1888, § 3279.

[79] ARKANSAS: Sand. & H. Dig. 1894, § 5453. FLORIDA: McClel. Dig. 1881, c. 139, § 4. IOWA: McClain's Code 1888, § 3335. MARYLAND: Code 1888, art. 73, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1706.

[80] Pub. St. 1882, c. 75, § 5.

[81] Code 1886, § 1710.

[82] Code 1892, § 2767.

[83] DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 6.

[84] ALABAMA: Code 1886, § 1710. ARKANSAS: Sand. & H. Dig. 1894, § 5452. COLORADO: Mills' Ann. St. 1891, § 3374. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 6. FLORIDA: McClel. Dig. 1881, c. 159, § 4. GEORGIA: Code 1882, § 1925. IDAHO: Rev. St. 1887, § 3273. ILLINOIS: Starr & C. Ann. St. 1896, c. 84, § 6. INDIANA: Rev. St. 1894, § 8112. IOWA: McClain's Code 1888, § 3335. KANSAS: Gen. St. 1889, par. 3982. MAINE: Rev. St. 1883, c. 33, § 3. MARYLAND: Code 1888, art. 73, § 4. MASSACHUSETTS: Pub. St. 1882, c. 75, § 5. MICHIGAN: How. Ann. St. 1882, § 2346. MINNESOTA: Gen. St. 1894, § 2335. MISSISSIPPI: Code 1880, § 1008. MONTANA: Civ. Code, 1895, § 3293. NEVADA: Gen. St. 1885, § 4908. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 4. NEW JERSEY: Gen. St. 1895, "Partnership," § 6. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 6. OHIO: Rev. St. 1892, § 3145. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 7. SOUTH CAROLINA: Rev. St. 1893, § 1412. TENNESSEE: Code 1884, § 2402. TEXAS: Rev. St. 1895, art. 3588. VERMONT: St. 1894, § 4279. WYOMING: Rev. St. 1887, § 4072.

places of business in different counties, a transcript of the certificate and of the acknowledgment thereof, duly certified, must be filed and recorded in like manner in every such county.[85]

195. PUBLICATION—A copy of the certificate must be published as required by statute.

It is almost universally required that a copy of the certificate shall be published by advertisement in a newspaper.[86] In Maryland [87]

[85] ALABAMA: Code 1886, § 1710. ARKANSAS: Sand. & H. Dig. 1894, § 5453. CALIFORNIA: Civ. Code 1886, § 2480. COLORADO: Mills' Ann. St. 1891, § 2519. CONNECTICUT: Gen. St. 1888, § 3279. DAKOTA: Comp. Laws 1887, § 4075. DELAWARE: Rev. Code 1874, c. 64, § 3. FLORIDA: McClel. Dig. 1881, c. 159, § 4. IDAHO: Rev. St. 1887, § 3273. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 6. INDIANA: Rev. St. 1894, § 8112. IOWA: McClain's Code 1888, § 3335. KANSAS: Gen. St. 1889, par. 3983. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 3. MARYLAND: Code 1888, art. 73, § 4. MICHIGAN: How. Ann. St. 1882, § 2347. MINNESOTA: Gen. St. 1894, § 2335. MISSISSIPPI: Code 1892, § 2767. MISSOURI: Rev. St. 1889, § 7198. NEBRASKA: Cobbey's Consol. St. 1891, § 3236. NEW JERSEY: Gen. St. 1895, "Partnership," § 6. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 6. NORTH CAROLINA: Code 1883, § 3092. NORTH DAKOTA: Rev. Code 1895, § 4419. OHIO: Rev. St. 1892, § 3145. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 7. RHODE ISLAND: Gen. Laws 1896, c. 157, § 4. SOUTH CAROLINA: Rev. St. 1893, § 1412. TENNESSEE: Code 1884, § 2403. TEXAS: Rev. St. 1895, art. 3588. UTAH: Comp. Laws 1888, § 2478. VERMONT: St. 1894, § 4279. VIRGINIA: Code 1887, § 2866. WEST VIRGINIA: Code 1891, c. 100, § 4; Laws 1883, c. 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1706. WYOMING: Rev. St. 1887, § 4072.

[86] ALABAMA: Code 1886, § 1714. ARKANSAS: Sand. & H. Dig. 1894, § 5456. CALIFORNIA: Civ. Code 1886, § 2483. COLORADO: Mills' Ann. St. 1891, § 3377. CONNECTICUT: Gen. St. 1888, § 3280. DAKOTA: Comp. Laws 1887, § 4078. DELAWARE: Rev. Code 1874, c. 64, § 3. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 10. FLORIDA: McClel. Dig. 1881, c. 159, § 8. GEORGIA: Code 1882, § 1928. IDAHO: Rev. St. 1887, § 3276. ILLINOIS: Starr & C. Ann. St. 1896, c. 84, § 9. INDIANA: Rev. St. 1894, § 8113. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. KANSAS: Gen. St. 1889, par. 3986. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 7. MASSACHUSETTS: Pub. St. 1882, c. 75, § 6. MICHIGAN: How. Ann. St. 1882, § 2350. MINNESOTA: Gen. St. 1894, § 2338. MISSISSIPPI: Code 1880,

[87] Code 1888, art. 73, § 7.

and South Carolina,[88] where no newspaper is published in the county where the principal place of business is situated, publication may be by posting copies. In a few states the publication is required to be made in two newspapers.[89] The publication must generally be made immediately after filing the certificate for record.[90] In Georgia the publication is required to be within two months after

§ 1011. MISSOURI: Rev. St. 1889, § 7198. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEVADA: Gen. St. 1885, § 4909. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 4. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. NORTH CAROLINA: Code 1883, § 3096. NORTH DAKOTA: Rev. Code 1895, § 4422. OHIO: Rev. St. 1892, § 3146. OREGON: 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," §§ 9, 10. RHODE ISLAND: Gen. Laws 1896, c. 157, § 5. SOUTH CAROLINA: Rev. St. 1893, § 1415. TENNESSEE: Mill. & V. Code 1884, § 2407. TEXAS: Rev. St. 1895, art. 3591. UTAH: Comp. Laws 1888, § 2481. VERMONT: St. 1894, § 4280. VIRGINIA: Code 1887, § 2867. WASHINGTON: Gen. St. 1891, § 2920. WEST VIRGINIA: Code 1891, c. 100, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709. WYOMING: Rev. St. 1887, § 4075.

[88] Rev. St. 1893, § 1415.

[89] ALABAMA: Code 1886, § 1714. GEORGIA: Code 1882, § 1928. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. MARYLAND: Code 1888, art. 73, § 7. MICHIGAN: How. Ann. St. 1882, § 2350. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10 RHODE ISLAND: Gen. Laws, 1896, c. 157, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709.

[90] ALABAMA: Code 1886, § 1714. ARKANSAS: Sand. & H. Dig. 1894, § 5456. COLORADO: Mills' Ann. St. 1891, § 3377. DELAWARE: Rev. Code 1874, c. 64, § 2. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 10. FLORIDA: McClel. Dig. 1881, c. 159, § 8. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 9. INDIANA: Rev. St. 1894, § 8113. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. KANSAS: Gen. St. 1889, par. 3986. MARYLAND: Code 1888, art. 73, § 7. MASSACHUSETTS: Pub. St. 1882, c. 75, § 6. MICHIGAN: How. Ann. St. 1882, § 2350. MINNESOTA: Gen. St. 1894, § 2338. MISSISSIPPI: Code 1880, § 1011. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEVADA: Gen. St. 1885, § 4909. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 4. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. NORTH CAROLINA: Code 1883, § 3096. OHIO: Rev. St. 1892, § 3146. OREGON 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10. RHODE ISLAND: Gen. Laws 1896, c. 157, § 5. SOUTH CAROLINA: Rev. St. 1893, § 1415. TENNESSEE: Mill. & V. Code

record;[91] in Maine within twenty days;[92] in Idaho within one month.[93] In some states the paper in which the certificate is to be published is designated by the clerk or recorder,[94] but in the majority of states the newspapers must be published in the county, city, or district where the principal place of business of the partnership is to be.[95] If no paper is published in such county, some statutes provide that the publication may be in a paper published in

1884, § 2407. TEXAS: Rev. St. 1895, art. 3591. UTAH: Comp. Laws 1888, § 2481. VERMONT: St. 1894, § 4280. VIRGINIA: Code 1887, § 2867. WASHINGTON: Gen. St. 1891, § 2920. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709. WYOMING: Rev. St. 1887, § 4075. When the certificate of a limited partnership is recorded October 1st, and publication is not made until October 16th, there is still compliance with 2 Rev. St. N. Y. pt. 2, c. 4, tit. 1, § 9, requiring partners to publish the terms of the partnership, when requested, for at least six weeks "immediately" after the recording of the certificate. Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129.

[91] Code 1882, § 1928.

[92] Rev. St. 1883, c. 33, § 5.

[93] Rev. St. 1887, § 3276.

[94] ALABAMA: Code 1886, § 1704. ARKANSAS: Sand. & H. Dig. 1894, § 5456. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 10. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. MARYLAND: Code 1888, art. 73, § 7. MICHIGAN: How. Ann. St. 1882, § 2350. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10. TENNESSEE: Mill. & V. Code 1884, § 2407. TEXAS: Rev. St. 1895, art. 3591. UTAH: Comp. Laws 1888, § 2481. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709.

[95] CALIFORNIA: Civ. Code 1886, § 2483. COLORADO: Mills' Ann. St. 1891, § 3377. CONNECTICUT: Gen. St. 1888, § 3280. DAKOTA: Comp. Laws 1887, § 4078. FLORIDA: McClel. Dig. 1881, c. 159, § 8. GEORGIA: Code 1882, § 1928. IDAHO: Rev. St. 1887, § 3276. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 9. INDIANA: Rev. St. 1894, § 8113. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. KANSAS: Gen. St. 1889, par. 3986. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 7. MASSACHUSETTS: Pub. St. 1882, c. 75, § 6. MICHIGAN: How. Ann. St. 1882, § 2350. MINNESOTA: Gen. St. 1894, § 2338. MISSISSIPPI: Code 1880, § 1011. MISSOURI: Rev. St. 1889, § 7198. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEVADA: Gen. St. 1885, § 4909. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. NORTH CAROLINA: Code 1883, § 3096. NORTH DAKOTA: Rev. Code 1895, § 4422. OHIO: Rev. St. 1892, § 3146. OREGON: 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10. SOUTH

some adjoining county,[96] or in the same judicial district,[97] or in a paper in which the sheriff advertises,[98] or in some paper published in the principal city or capital of the state,[99] or some paper designated by the clerk.[100] In Rhode Island[101] and Delaware[102] the publication may be made in any paper published in the state. In Oregon[103] and Washington[104] the words "having general circulation in the county" are added. In some states, where the partnership has places of business in several counties, the certificate must be published in each of such counties.[105] Publication should be made once a week in some states for six successive weeks;[106] in

CAROLINA: Rev. St. 1893, § 1415. UTAH: Comp. Laws 1888, § 2481. VERMONT: St. 1894, § 4280. VIRGINIA: Code 1887, § 2867. WASHINGTON: Gen. St. 1891, § 2920. WEST VIRGINIA: Code 1891, c. 100, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709. WYOMING: Rev. St. 1887, § 4075.

[96] CALIFORNIA: Civ. Code 1886, § 2483. COLORADO: Mills' Ann. St. 1891, § 3377. DAKOTA: Comp. Laws 1887, § 4078. FLORIDA: McClel. Dig. 1881, c. 159, § 8. IDAHO: Rev. St. 1887, § 3276. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 9. INDIANA: Rev. St. 1894, § 8113. KENTUCKY: St. 1894, c. 94, § 3770. MAINE; Rev. St. 1883, c. 33, § 5. MISSISSIPPI: Code 1880, § 1011. MISSOURI: Rev. St. 1889, § 7198. NEVADA: Gen. St. 1885, § 4909. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NORTH DAKOTA: Rev. Code 1895, § 4422. OHIO: Rev. St. 1892, § 3146. SOUTH CAROLINA: Rev. St. 1893, § 1415. UTAH: Comp. Laws 1888, § 2481. VERMONT: St. 1894, § 4280. WYOMING: Rev. St. 1887, § 4075.

[97] NEBRASKA: Cobbey's Consol. St. 1891, § 3239.

[98] GEORGIA: Code 1882, § 1928.

[99] MASSACHUSETTS: Pub. St. 1882, c. 75, § 6. MINNESOTA: Gen. St. 1894, § 2338. MISSOURI: Rev. St. 1889, § 7198.

[100] MARYLAND: Code 1888, art. 73, § 7.

[101] Gen. Laws 1896, c. 157, § 5.

[102] Rev. Code 1874, c. 64, § 3.

[103] 2 Hill's Ann. Laws 1892, § 3851.

[104] Gen. St. 1891, § 2920.

[105] KENTUCKY: St. 1894, c. 94, § 3770. MARYLAND: Code 1888, art. 73, § 7. MISSOURI: Rev. St. 1889, § 7198. OHIO: Rev. St. 1892, § 3146. VIRGINIA: Code 1887, § 2867. WEST VIRGINIA: Code 1891, c. 100, § 4.

[106] ALABAMA: Code 1886, § 1714. ARKANSAS: Sand. & H. Dig. 1894, § 5456. CONNECTICUT: Gen. St. 1888, § 3280. DELAWARE: Rev. Code 1874, c. 64, § 3. FLORIDA: McClel. Dig. 1881, c. 159, § 8. GEORGIA: Code 1882, § 1928. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 9. IN-

others, for three successive weeks;[107] in others, for four successive weeks;[108] in Mississippi, for three months.[109] In most states the statutes provide that failure to make the required publication shall render the partnership a general one.[110] Upper Canada and Loui-

DIANA: Rev. St. 1894, § 8113. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 7. MASSACHUSETTS: Pub. St. 1882, c. 75, § 6. MICHIGAN: How. Ann. St. 1882, § 2350. MINNESOTA: Gen. St. 1894, § 2338. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. NORTH CAROLINA: Code 1883, § 3096. OHIO: Rev. St. 1892, § 3146. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10. RHODE ISLAND: Gen. Laws 1896, c. 157, § 5. SOUTH CAROLINA: Rev. St. 1893, § 1415. TENNESSEE: Mill. & V. Code 1884, § 2407. TEXAS: Rev. St. 1895, art. 3591. VERMONT: St. 1894, § 4280. VIRGINIA: Code 1873, c. 142, § 4. WEST VIRGINIA: Code 1891, c. 100, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709.

[107] NEVADA: Gen. St. 1885, § 4909. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 4.

[108] CALIFORNIA: Civ. Code 1886, § 2483. COLORADO: Mills' Ann. St. 1891, § 3377. DAKOTA: Comp. Laws 1887, § 4078. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 10. IDAHO: Rev. St. 1887, § 3276. KANSAS: Gen. St. 1889, par. 3986. KENTUCKY: St. 1894, c. 94, § 3770. MISSOURI: Rev. St. 1889, § 7198. NORTH DAKOTA: Rev. Code 1895, § 4422. OREGON: 2 Hill's Ann. Laws 1891, § 3377. UTAH: Comp. Laws 1888, § 2481. WASHINGTON: Gen. St. 1891, § 2920. WYOMING: Rev. St. 1887, § 4075.

[109] Code 1880, § 1011.

[110] ALABAMA: Code 1886, § 1714. ARKANSAS: Sand. & H. Dig. 1894, § 5456. CALIFORNIA: Civ. Code 1886, § 2483. COLORADO: Mills' Ann. St. 1891, § 3377. DAKOTA: Comp. Laws 1887, § 4078. DELAWARE: Rev. Code 1874, c. 64, § 3. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 11. GEORGIA: Code 1882, § 1928. IDAHO: Rev. St. 1887, § 3276. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 9. INDIANA: Rev. St. 1894, § 8113. IOWA: McClain's Code 1888, § 3338; Laws 1882, c. 8. KANSAS: Gen. St. 1889, par. 3986. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 7. MICHIGAN: How. Ann. St. 1882, § 2350. MINNESOTA: Gen. St. 1894, § 2338. MISSISSIPPI: Code 1880, § 1011. MISSOURI: Rev. St. 1889, § 7198. NEBRASKA: Cobbey's Consol. St. 1891, § 3239. NEVADA: Gen. St. 1885, § 4909. NEW JERSEY: Gen. St. 1895, "Partnership," § 9. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 9. NORTH CAROLINA: Code 1883, § 3096. NORTH DAKOTA: Rev. Code 1895, § 4422. OHIO: Rev.

siana require no publication.[111] Connecticut does not specify the consequence of failure to make publication.[112]

Proof of Publication.

In some states no provision is made for proving due publication; but in most states the statute provides that the affidavit of the fact of publication made by the publisher or editor of the newspaper in which publication is made may or shall be filed with the clerk or recording officer, and, when filed, shall be presumptive or prima facie evidence of the facts therein contained.[113] In Maryland,

St. 1892, § 3146. OREGON: 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 10. RHODE ISLAND: Gen. Laws 1896, c. 157, § 5. SOUTH CAROLINA: Rev. St. 1893, § 1415. TENNESSEE: Mill. & V. Code 1884, § 2407. TEXAS: Rev. St. 1895, art. 3591. UTAH: Comp. Laws 1888, § 2481. VERMONT: St. 1894, § 4280. VIRGINIA: Code 1887, § 2867. WASHINGTON: Gen. St. 1891, § 2920. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1709. WYOMING: Rev. St. 1887, § 4075.

[111] See Bates, Lim. Partn. 40.

[112] Gen. St. 1888, § 3280.

[113] ALABAMA: Code 1886, § 1715. ARKANSAS: Sand. & H. Dig. 1894, § 5457. CALIFORNIA: Civ. Code 1886, § 2484. DAKOTA: Comp. Laws 1887, § 4079. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 12. GEORGIA: Code 1882, § 1929. IDAHO: Rev. St. 1887, § 3277. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 10. IOWA: McClain's Code 1888, § 3339. KANSAS: Gen. St. 1889, par. 3987. MARYLAND: Code 1888, art. 73, § 8. MICHIGAN: How. Ann. St. 1882, § 2351. MINNESOTA: Gen. St. 1894, § 2339. MISSISSIPPI: Code 1880, § 1012. NEBRASKA: Cobbey's Consol. St. 1891, § 3240. NEW JERSEY: Gen. St. 1895, "Partnership," § 10. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 10. NORTH CAROLINA: Code 1883, § 3097. NORTH DAKOTA: Rev. Code 1895, § 4423. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 12. SOUTH CAROLINA: Rev. St. 1893, § 1416. TENNESSEE: Mill. & V. Code 1884, § 2408. TEXAS: Rev. St. 1895, art. 3592. UTAH: Comp. Laws 1888, § 2482. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1710. WYOMING: Rev. St. 1887, § 4076. Where a certificate of the formation of a limited partnership is made, certified, and recorded, and publication is made, a statute which provides that, unless the partners shall publish "the terms" of the partnership in a newspaper, it shall be deemed a general partnership, the creditors of the partnership so formed, who have dealt with it, and recognized it as a limited partnership, are estopped to claim that it is general because the publication failed to state its terms. Tracy v. Tuffly, 134 U. S. 206, 10 Sup. Ct. 527.

where the publication is by posting notices, it may be proved by the affidavit of any disinterested person.[114]

SAME—AFFIDAVIT.

196. At the time of filing the original certificate, there must also, in most states, be filed an affidavit of one or more of the general partners, stating that the sums specified in the certificate to have been paid in by the special partners have been actually and in good faith paid in cash.

In several states the affidavit must be made by all the general partners,[115] and, in states where the contribution of the special partner may be either cash or its equivalent, the affidavit must conform to the facts.[116]

[114] Code 1888, art. 73, § 8.

[115] CONNECTICUT: Gen. St. 1888, § 3279. IDAHO: Rev. St. 1887, § 3274. TEXAS: Rev. St. 1895, art. 3589. WYOMING: Rev. St. 1887, § 4073. Cf. Rawitzer v. Wyatt, 42 Fed. 287.

[116] ALABAMA: Code 1886, § 1711. ARKANSAS: Sand. & H. Dig. 1894, § 5454. CALIFORNIA: Civ. Code 1886, § 2481. COLORADO: Mills' Ann. St. 1891, § 3375. CONNECTICUT: Gen. St. 1888, § 3279. DAKOTA: Comp. Laws 1887, § 4076. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 7. FLORIDA: McClel. Dig. 1881, c. 159, § 5. GEORGIA: Code 1882, § 1926. IDAHO: Rev. St. 1887, § 3274. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 7. IOWA: McClain's Code 1888, § 3336. KANSAS: Gen. St. 1889, par. 3984. KENTUCKY: St. 1894, c. 94, § 3769. MARYLAND: Code 1888, art. 73, § 5. MICHIGAN: How. Ann. St. 1882, § 2348. MINNESOTA: Gen. St. 1894, § 2336. MISSISSIPPI: Code 1892, § 2768. MISSOURI: Rev. St. 1889, § 7197. NEBRASKA: Cobbey's Consol. St. 1891, § 3237. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 5. NEW JERSEY: Gen. St. 1895, "Partnership," § 7. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 7. NORTH CAROLINA: Code 1883, § 3093. NORTH DAKOTA: Rev. Code 1895, § 4420. PENNSYLVANIA: Pepper § L. Dig. 1894, "Limited Partnership," § 8. SOUTH CAROLINA: Rev. St. 1893, § 1413. TENNESSEE: Mill. & V. Code 1884, § 2404. TEXAS: Rev. St. 1895, art. 3589. UTAH: Comp. Laws 1888, § 2479. VIRGINIA: Code 1887, § 2865. WEST VIRGINIA: Code 1891, c. 100, § 3. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1707. WYOMING: Rev. St. 1887, § 4073. For an affidavit held sufficient, see Crouch v. Bank, 156 Ill. 342, 40 N. E. 974. Where a person, under a private agreement with a special partner in a limited copartnership, furnishes

SAME—CONTRIBUTIONS OF GENERAL AND SPECIAL PARTNERS.

197. The contribution of the special partner must be actually paid in before the certificate is filed, and in most states must consist of actual cash, though in a few states it may consist of property, or of both. A general partner need make no contribution to the firm capital.

The general partner is not required to make any contribution to the capital of the firm.[117] But the rule requiring the contribution of the special partner to be actually paid in is very strictly enforced. Such payment must be unconditional, and without the reservation of any control by the special partner as to its use.[118] "The payment must be made to and in the hands of the general partners before the certificate is filed, in actual cash. Neither check nor promise nor subsequent payment will suffice, for the certificate and affidavit are required to recite what has been done, and not

a certain portion of the capital, which the special partner puts into the business of the firm in his own name, and is to have a certain portion of the income or profits which the special partner derives from the business, with a privilege of examining from time to time into the business matters of the firm, he and the special partner become thereby general partners. Buckley v. Lord, 24 How. Prac. (N. Y.) 455.

[117] Holliday v. Paper Co., 3 Colo. 342.

[118] Richardson v. Hogg, 38 Pa. St. 153; Hill v. Stetler, 127 Pa. St. 145, 13 Atl. 306, and 17 Atl. 887; Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320. It is unlawful for the general partners in a limited partnership organized under the act of March 21, 1836 (P. L. 143), to assume, without any consideration, the debt created by the special partner in procuring the money which he pays into the firm as his special contribution. Coffin's Appeal, 106 Pa. St. 280. When the special partner, under a limited partnership, does not pay in the amount of his capital specified in the certificate, and the firm, having become insolvent, assigns the property thereof for the benefit of creditors. he may, upon a complaint in equity, filed by the trustee, be compelled to pay in the deficiency of his capital, to be used in the payment of the partnership debts. Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221. It does not depend on the means used by the special partner to obtain the money, so long as the ownership of the money paid in is in the special partner. Lawrence v. Merrifield, 42 N. Y. Super. Ct. 36.

what is executory."[119] Where the statute requires cash, payment in property or bonds is not a compliance.[120] Good faith and an honest intention to comply with the statute will not protect the

[119] Bates, Lim. Partn. § 47, citing Durant v. Abendroth, 69 N. Y. 148; Maginn v. Lawrence, 45 N. Y. Super. Ct. 235; Hogg v. Orgill, 34 Pa. St. 344; Seibert v. Bakewell, 87 Pa. St. 506; De Lizardi v. Gossett, 1 La. Ann. 138. Cf. Brown v. Davis, 6 Duer (N. Y.) 549; Tasker v. Brown, 8 Pa. Co. Ct. R. 390; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Hall v. Glessner, 100 Mo. 155, 13 S. W. 349. In Durant v. Abendroth, supra, the special partner's contribution was paid by a postdated check, and, although this was paid, he was held liable as a general partner, on the ground that the affidavit averring payment in cash was untrue. And see, Griggs v. Day (Super. N. Y.) 12 N. Y. Supp. 958. Under the New York statute relating to limited partnerships, the payment by a special partner of a portion of the capital contributed by him, in the checks of third persons (it being conceded that they represented cash, and that the amount actually went into the firm business), is not such a violation of the provision requiring an actual cash payment as will render him liable as a general partner. Hogg v. Orgill, 34 Pa. St. 344. So held if payment by check on a solvent bank. Metropolitan Nat. Bank v. Palmer, 56 Hun, 641, 9 N. Y. Supp. 239; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276. A check given by a special partner, as his capital in the firm, which is received by a bank, and without verification placed as cash to the credit of the firm, and which, on presentation, is paid by the bank on which it is drawn, is a sufficient compliance with a statute, requiring the capital of a special partner to be paid in cash. Rothchild v. Hoge, 43 Fed. 97. A certificate is not insufficient because made before the special capital is paid in, if it is not filed until afterwards. Fifth Ave. Bank v. Colgate, 54 N. Y. Super. Ct. 188. In Louisiana the contribution of the special partner need not be paid in at the start. De Lizardi v. Gossett, 1 La. Ann. 138.

[120] Haggerty v. Foster, 103 Mass. 17; Pierce v. Bryant, 5 Allen (Mass.) 91; Durant v. Abendroth, 69 N. Y. 148; Kohler v. Lindenm Eyr. 129 N. Y. 498, 29 N. E. 957; Haviland v. Chace, 39 Barb. (N. Y.) 283; Van Ingen v. Whitman, 62 N. Y. 513; Hill v. Stetler (Pa. Sup.) 13 Atl. 306; Richardson v. Hogg, 38 Pa. St. 153; Bement v. Machine Co., 12 Phila. 494; Lineweaver v. Slagle, 64 Md. 465, 2 Atl. 693; In re Thayer, 7 Am. Law Rev. 177, Fed. Cas. No. 13,867; Patterson v. Holland, 7 Grant, Ch. (U. C.) 1; Watts v. Taft, 16 U. C. Q. B. 256. Where a limited partnership is attempted to be formed, but the contribution of the special partner is made in goods, and not in cash, as required by the statute, the partnership must be treated as a general one so far as the liability of the partners to creditors is concerned. In re Allen, 41 Minn. 430, 43 N. W. 382. A contribution of "a specific amount of capital in cash, or other property at cash value," is not made by postponing the payment of the indebtedness to the special partners due from a preceding insolvent firm, until the new firm shall have paid the other creditors of the old one. Manhattan Brass Co. v. Allin, 35 Ill. App. 336. Where,

special partner.[121] Nor need a creditor prove that he has been injured by the failure to comply with the statute. The statute must be actually complied with.[122] The failure of one named as a special partner to pay in his contribution, as required, will render others, who were also to be special partners, liable as general partners, although these latter persons have on their own part fully complied with the statute.[123] Where property constitutes a part of the contribution, it must be appraised,[124] and the certificate must state the precise amount of cash and of property contributed.[125]

on termination of a limited partnership, another limited partnership, composed of the same persons, is attempted to be created, and it is agreed that the contribution made by the special partner to the former firm, and the amount of the indebtedness of such firm to him, should be accepted as his contribution to the new firm, there is not a cash payment by the special partner. First Nat. Bank of Jersey City v. Huber, 75 Hun, 80, 26 N. Y. Supp. 961. Under Act Pa. May 1, 1876 (P. L. 89), which allows contributions to the capital of a limited partnership to be made "in real or personal estate, mines, or other property, at a valuation to be approved by all the members," such contribution may be made by the transfer of patent rights. Rehfuss v. Moore, 134 Pa. St. 462, 19 Atl. 756.

[121] Smith v. Argall, 6 Hill (N. Y.) 479; Durant v. Abendroth, 69 N. Y. 148; Argall v. Smith, 3 Denio (N. Y.) 435; Pierce v. Bryant, 5 Allen (Mass.) 91; Haggerty v. Foster, 103 Mass. 17.

[122] Durant v. Abendroth, 69 N. Y. 148; Pierce v. Bryant, 5 Allen (Mass.) 91; Holliday v. Paper Co., 3 Colo. 342; In re Thayer, 7 Am. Law Rev. 127, Fed. Cas. No. 13,867.

[123] Whittemore v. Macdonell, 6 U. C. C. P. 547.

[124] FLORIDA: McClel. Dig. 1881, c. 159, § 6. Vandike v. Rosskam, 67 Pa. St. 330. See Siegel v. Wood, 3 Pa. Dist. R. 463; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[125] Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; Cock v. Bailey, 146 Pa. St. 328, 23 Atl. 370; Lilley v. Bailey, 146 Pa. St. 342, 23 Atl. 372; Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16; Maloney v. Bruce, 94 Pa. St. 249; Vandike v. Rosskam, 67 Pa. St. 330; In re Merrill, 12 Blatchf. 221, Fed. Cas. No. 9,467; Holliday v. Paper Co., 3 Colo. 342. Cf. Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501. Where the statute does not require that the capital should be paid in cash, and it is paid in property, it should be so stated, and its cash value given. Holliday v. Paper Co., 3 Colo. 342. In the absence of fraud, an excessive valuation put upon patent rights contributed to the capital of a limited partnership by the members does not vitiate the partnership. Rehfuss v. Moore, 134 Pa. St. 462, 19 Atl. 756.

SAME—FIRM NAME.

198. In most states the partnership business must be transacted in a firm name in which the names of the special partners do not appear, and without the addition of the word "Company" or any other general term.

In ordinary partnerships, as has been seen, the use of a firm name is not necessary,[126] but in limited partnerships it is necessary. It is one of the things that must be stated in the certificate. Moreover, many of the statutes specifically require the business to be transacted under a firm name, and provide that any alteration shall forfeit the protection of the statute. The statutes utilize the firm name to force notice of the limited liability upon persons dealing with the firm, and to warn persons giving it credit that at least part of its means are derived from persons not liable beyond the fund.[127] The following are the statutory provisions on the subject: In most states the names of the general partners only may be inserted in the firm name,[128] and without the addition of the word

[126] Ante, p. 105.

[127] Penrose v. Martyr, El., Bl. & El. 499, 503.

[128] ALABAMA: Code 1886, § 1718. ARKANSAS: Sand. & H. Dig. 1894, § 5460. COLORADO: Mills' Ann. St. 1891, § 3378. CONNECTICUT: Gen. St. 1888, § 3278. DAKOTA: Comp. Laws 1887, § 4081. DELAWARE: Rev. Code 1874, c. 64, § 4. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 17. FLORIDA: McClel. Dig. 1881, c. 159, § 9. GEORGIA: Code 1882, § 1932. IDAHO: Rev. St. 1887, § 3294. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 16. INDIANA: Rev. St. 1894, § 8115. IOWA: McClain's Code 1888, § 3342. KANSAS: Gen. St. 1889, par. 3990. KENTUCKY: St. 1894, c. 94, § 3773. MAINE: Rev. St. 1883, c. 33, § 6. MARYLAND: Code 1888, art. 73, § 11. MASSACHUSETTS: Pub. St. 1882, c. 75, § 3. MICHIGAN: How. Ann. St. 1882, § 2354. MINNESOTA: Gen. St. 1894, § 2342. MISSISSIPPI: Code 1892, § 2770. MISSOURI: Rev. St. 1889, § 7201. MONTANA: Civ. Code 1895, § 3343. NEBRASKA: Cobbey's Consol. St. 1891, § 3243. NEVADA: Gen. St. 1885, § 4911. NEW JERSEY: Gen. St. 1895, "Partnership," § 13. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13. NORTH CAROLINA: Code 1883, § 3100. NORTH DAKOTA: Rev. Code 1895, § 4425. OHIO: Rev. St. 1892, § 3150. OREGON: 2 Hill's Ann. Laws 1892, § 3853. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 17. RHODE ISLAND: Gen. Laws 1896, c. 157, § 8. SOUTH CAROLINA: Rev.

"Company" or any other general term.[129] In Massachusetts[130] and Vermont,[131] if there are more than three general partners, all their names need not be inserted. So, in several other states, if there are two or more general partners, the names of one or more only need be inserted,[132] and in some states the words "and Company" may be added.[133] In Massachusetts[134] and Pennsylvania,[135] if

St. 1893, § 1419. TENNESSEE: Mill. & V. Code 1884, § 2411. TEXAS: Rev. St. 1895, art. 3595. UTAH: Comp. Laws 1888, § 2485. VERMONT: St. 1894, § 4282. VIRGINIA: Code 1887, § 2871. WASHINGTON: Gen. St. 1891, § 2922. WEST VIRGINIA: Code 1891, c. 100, § 7. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713. WYOMING: Rev. St. 1887, § 4093.

[129] ALABAMA: Code 1876, § 2076. ARKANSAS: Sand. & H. Dig. 1894, § 5460. DAKOTA: Comp. Laws 1887, § 4081. FLORIDA: McClel. Dig. 1881, c. 159, § 9. GEORGIA: Code 1882, § 1932. IOWA: McClain's Code 1888, § 3342. KANSAS: Gen. St. 1889, par. 3990. KENTUCKY: St. 1894, c. 94, § 3773. MAINE: Rev. St. 1883, c. 33, § 6. MASSACHUSETTS: Pub. St. 1882, c. 75, § 3. MISSISSIPPI: Code 1880, § 1013. MISSOURI: Rev. St. 1889, § 7201. NEW JERSEY: Gen. St. 1895, "Partnership," § 13. NORTH CAROLINA: Code 1883, § 3100. NORTH DAKOTA: Rev. Code 1895, § 4425. OREGON: 2 Hill's Ann. Laws 1892, § 3853. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 17. SOUTH CAROLINA: Rev. St. 1893, § 1419. TENNESSEE: Mill. & V. Code 1884, § 2411. TEXAS: Rev. St. 1895, art. 3595. VERMONT: St. 1894, § 4282. VIRGINIA: Code 1887, § 2871. WASHINGTON: Gen. St. 1891, § 2922. WEST VIRGINIA: Code 1891, c. 100, § 7. Hampden Bank v. Morgan, 2 Haz. Reg. U. S. 57, Fed. Cas. No. 6,008.

[130] Pub. St. 1882, c. 75, § 3.

[131] St. 1894, § 4282.

[132] CONNECTICUT: Gen. St. 1888, § 3278. MARYLAND: Code 1888, art. 73, § 11. MINNESOTA: Gen. St. 1894, § 2342. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13. OHIO: Rev. St. 1892, § 3150. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 18. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713.

[133] DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 17. MARYLAND: Code 1888, art. 73, § 11. MICHIGAN: How. Ann. St. 1882, § 2354. MINNESOTA: Gen. St. 1894, § 2342. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13. OHIO: Rev. St. 1892, § 3150. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 18. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713. Cf. Gibb v. Mershon, 14 Wkly. Notes Cas. 89. Metropolitan Nat. Bank v. Gruber, Id. 12. Vilas Bank v. Bullock, 10 Phila. 309. Where the names of all

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[134] Pub. St. 1882, c. 75, § 3.

[135] Pepper & L. Dig. 1894, "Limited Partnership," § 19.

the surname of the special partner be the same as that of a general partner, such surname may be used without rendering him liable as a general partner. The Ohio statute provides that a firm of general partners that have transacted business under one firm name for more than five years may organize a special partnership to continue the same business, containing any of the same or additional partners, and adopt the firm name before used, publication being duly made.[136] In California,[137] Idaho,[138] and Wyoming [139] the name of a special partner may not be used unless the word "Limited" be added to the firm name. So, in Maryland [140] and Florida,[141] the word "Limited" must be attached to the style and signature of the firm in all business transactions; and, if this be done, such limited partner may take part in the business without, on that account, being deemed a general partner. In New York any limited partnership may use the firm name of any former general or limited partnership, when a ma-

the partners are correctly given in a certificate of special partnership, the use of the words "and Company" in the firm name, as a collective appellation to designate the persons specifically named, does not render a special partner liable as a general partner. Hubbard v. Morgan, Fed. Cas. No. 6,817. Laws 1866, c. 661, amending the limited partnership law so as to allow the use of the words "& Co." in the firm name, "where there are two or more general partners," without making the special partners liable as general partners, does not apply where there is only one general partner. Buck v. Hopkins, 82 Hun, 29, 31 N. Y. Supp. 324. Section 13 of the limited partnership act (1 Rev. St. 765), as amended by Laws 1866, c. 661, providing that the partnership business shall be conducted under a firm style in which the names of the general partners only shall be inserted, except that where there are two or more general partners the firm name may consist of one or more such general partners, "with or without the addition of the words 'and Company'; and if the name of a special partner shall be used with his privity he shall be deemed a general partner,"—does not permit a limited partnership to use the term "and Company," as a part of the firm name, to represent a special partner, but such use does not affect the validity of the partnership, nor impose a general liability on the special partner so designated. (31 N. Y. Supp. 324, reversed.) Buck v. Alley, 145 N. Y. 488, 40 N. E. 236.

136 Rev. St. 1892, § 3150.

137 Civ. Code 1886, § 2510.

138 Rev. St. 1887, § 3294.

139 Rev. St. 1887, § 4093.

140 Code 1888, art. 73, § 12, Laws 1880, c. 203.

141 McClel. Dig. 1881, c. 159, § 2. See German v. Moodie, 9 Wkly. Notes Cas. 221.

jority of the partners, general or special, in such former partnership, or of the survivors, are members of the new one, or when such majority consents to the use of such firm name in writing, upon publishing and recording a certificate with the county clerk.[142] Under most of the statutes, if the name of a special partner be used in the firm with his privity [143] or with his consent,[144] he is deemed a general partner.

[142] Laws 1893, c. 263.

[143] ALABAMA: Code 1886, § 1718. ARKANSAS: Sand. & H. Dig. 1894, § 5460. DELAWARE: Rev. Code 1874, c. 64, § 4. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 19. FLORIDA: McClel. Dig. 1881, c. 159, § 9. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 16. INDIANA: Rev. St. 1894, § 8115. IOWA: McClain's Code 1888, § 3342. KANSAS: Gen. St. 1889, par. 3990. MARYLAND: Code 1888, art. 73, § 12; Laws 1880, c. 203. MASSACHUSETTS: Pub. St. 1882, c. 75, § 3. MICHIGAN: How. Ann. St. 1882, § 2354. MINNESOTA: Gen. St. 1894, § 2342. NEVADA: Gen. St. 1885, § 4911. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 6. NEW JERSEY: Gen. St. 1895, "Partnership," § 13. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13. NORTH CAROLINA: Code 1883, § 3100. OHIO: Rev. St. 1892, § 3150. OREGON: 2 Hill's Ann. Laws 1892, § 3853. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 17. RHODE ISLAND: Gen. Laws 1896, c. 157, § 8. SOUTH CAROLINA: Rev. St. 1893, § 1419. TENNESSEE: Mill. & V. Code 1884, § 2411. TEXAS: Rev. St. 1895, art. 3595. VERMONT: St. 1894, § 4282. VIRGINIA: Code 1887, § 2871. WASHINGTON: Gen. St. 1891, § 2922. WEST VIRGINIA: Code 1891, c. 100, § 7. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713. Cf. Idaho Rev. St. 1887, § 291.

[144] COLORADO: Mills' Ann. St. § 3378. DELAWARE: Rev. Code 1874, c. 64, § 4. INDIANA: Rev. St. 1894, § 8115. KANSAS: Gen. St. 1889, par. 3990. KENTUCKY: St. 1894, c. 94, § 3773. MAINE: Rev. St. 1883, c. 33, § 6. MASSACHUSETTS: Pub. St. 1882, c. 75, § 3. MICHIGAN: How. Ann. St. 1882, § 2354. MISSISSIPPI: Code 1892, § 2770. MISSOURI: Rev. St. 1889, § 7201. MONTANA: Civ. Code 1895, § 3343. NEVADA: Gen. St. 1885, § 4911. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 6. OREGON: 2 Hill's Ann. Laws 1892, § 3853. RHODE ISLAND: Gen. Laws 1896, c. 157, § 8. VERMONT: St. 1894, § 4282. WASHINGTON: Gen. St. 1891, § 2922.

SAME—FIRM SIGN.

199. In several states the partnership must post a sign in some conspicuous place, bearing the full name of all the partners.[145]

In some of the states the sign must distinguish which are limited partners.[146] In Missouri the words "Limited Partners" must be added.[147] The statutes of some states do not specifically state the result of a failure to comply with the statute in this respect. Pennsylvania is one of these states; but in Vandike v. Rosskam [148] it was said that, in default of proof that his name was painted on the sign, a special partner would be held liable as a general partner. The Kentucky [149] and Missouri [150] statutes expressly provide that in case of failure to keep up a sign at its place of business, giving the style of the firm, with the words "Limited Partners," the special partners shall be liable as general partners. The New York,[151] Ohio,[152] and South Carolina [153] statutes provide that, in default of compliance,

[145] DAKOTA: Comp. Laws 1887, § 4081. KENTUCKY: St. 1894, c. 94, § 3779. MINNESOTA: Gen. St. 1894, § 2342. MISSOURI: Rev. St. 1889, § 7207. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13. NORTH DAKOTA: Rev. Code 1895, § 4425. OHIO: Rev. St. 1892, § 3150, amendment. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 18. SOUTH CAROLINA: Rev. St. 1893, §§ 1432, 1434 (does not apply to special partners). WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713. See Rothchild v. Hoge, 43 Fed. 97. The expression "full names" of persons composing the association under the limited partnership act means the names in the form habitually used by those persons in business, and by which they are generally known in the community, and does not mean that given names must necessarily be spelled out in full in every case. Laflin & Rand Co. v. Steytler, 146 Pa. St. 434, 23 Atl. 215, followed. Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045.

[146] DAKOTA: Comp. Laws 1887, § 4081. KENTUCKY: St. 1894, c. 94, § 3779. NORTH DAKOTA: Rev. Code 1895, § 442. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 18. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1713.

[147] Rev. St. 1889, § 7207.

[148] 67 Pa. St. 330.

[149] St. 1894, c. 94, § 3779.

[150] Rev. St. 1889, § 7207.

[151] Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 13.

[152] Rev. St. 1892, § 3150, amendment.

[153] Rev. St. 1893, §§ 1432, 1434.

no action shall abate for failure to prove the names and number of the partners.

SAME—WHEN PARTNERSHIP BEGINS.

200. Until the certificate is duly made, acknowledged, and recorded, and, in states where it is required, the affidavit filed, no limited partnership is deemed to be formed.

201. A false statement in the certificate or affidavit, in most states, renders all the partners liable as general partners.

The statutes usually provide that no limited partnership shall be deemed to have been formed until the certificate shall have been made, acknowledged, and recorded, and, where an affidavit is required, until the affidavit is filed.[154] So, if any false statement is

[154] ALABAMA: Code 1886, §§ 1711, 1712. ARKANSAS: Sand. & H. Dig. 1894, § 5455. CALIFORNIA: Civ. Code 1886, § 2482. COLORADO: Mills' Ann. St. 1891, § 3376. CONNECTICUT: Gen. St. 1888, § 3279. DAKOTA: Comp. Laws 1887, § 4077. DELAWARE: Rev. Code 1874, c. 64, § 3. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 8. FLORIDA: McClel. Dig. 1881, c. 159, § 7. GEORGIA: Code 1882, § 1927. IDAHO: Rev. St. 1887, § 3275. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 34, § 8. INDIANA: Rev. St. 1894, § 8112. IOWA: McClain's Code 1888, § 3330–3336. KANSAS: Gen. St. 1889, par. 3985. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 3. MARYLAND: Code 1888, art. 73, § 6. MICHIGAN: How. Ann. St. 1882, § 2349. MINNESOTA: Gen. St. 1894, § 2337. MISSISSIPPI: Code 1892, § 2769. MISSOURI: Rev. St. 1889, § 7198. MONTANA: Civ. Code 1895, § 3295. NEBRASKA: Cobbey's Consol. St. 1891, § 3238. NEVADA: Gen. St. 1885, § 4908. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 4. NEW JERSEY: Gen. St. 1895, "Partnership," § 8. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 8. NORTH CAROLINA: Code 1883, § 3094. NORTH DAKOTA: Rev. Code 1895, § 4421. OHIO: Rev. St. 1892, § 3147. OREGON: 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 9. RHODE ISLAND: Gen. Laws 1896, c. 157, § 4. SOUTH CAROLINA: Rev. St. 1893, § 1414. TENNESSEE: Mill. & V. Code 1884, § 2405. TEXAS: Rev. St. 1895, art. 3590. UTAH: Comp. Laws 1888, § 2480. VERMONT: St. 1894, § 4279. VIRGINIA: Code 1887, § 2866. WASHINGTON: Gen. St. 1891, § 2920. WEST VIRGINIA: Code 1891, c. 100, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1708. WYOMING: Rev. St. 1887, § 4074.

made in such certificate or affidavit, all those interested in the partnership are, in nearly all states, liable as general partners.[155] In Missouri the statute provides that the person making a false affidavit shall be deemed guilty of perjury, and punished with the penalties

[155] ALABAMA: Code 1886, § 1713. ARKANSAS: Sand. & H. Dig. 1894, § 5455. CALIFORNIA: Civ. Code 1886, § 2480. COLORADO: Mills' Ann. St. 1891, § 3376. CONNECTICUT: Gen. St. 1888, § 3282. DAKOTA: Comp. Laws 1887, § 4075. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 9. FLORIDA: McClel. Dig. 1881, c. 159, § 7. GEORGIA: Code 1882, § 1927. IDAHO: Rev. St. 1887, § 3273. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 8. INDIANA: Rev. St. 1894, § 8112. IOWA: McClain's Code 1888, § 3337. KANSAS: Gen. St. 1889, par. 3985. KENTUCKY: St. 1894, c. 94, § 3770. MAINE: Rev. St. 1883, c. 33, § 4. MARYLAND: Code 1888, art. 73, § 6. MASSACHUSETTS: Pub. St. 1882, c. 75, § 4. MICHIGAN: How. Ann. St. 1882, § 2349. MINNESOTA: Gen. St. 1894, § 2337. MISSISSIPPI: Code 1892, § 2769. MISSOURI: Rev. St. 1889, § 7198. MONTANA: Civ. Code 1895, § 3293. NEBRASKA: Cobbey's Consol. St. 1891, § 3238. NEVADA: Gen. St. 1885, § 4908. NEW HAMPSHIRE. Gen. Laws 1878, c. 118, § 4. NEW JERSEY: Gen. St. 1895, "Partnership," § 8. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 8. NORTH CAROLINA: Code 1883, § 3095. NORTH DAKOTA: Rev. Code 1895, § 4419. OHIO: Rev. St. 1892, § 3145. OREGON: 2 Hill's Ann. Laws 1892, § 3851. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 9; RHODE ISLAND: Gen. Laws 1896, c. 157, § 7. SOUTH CAROLINA: Rev. St. 1893, § 1414. TENNESSEE: Mill. & V. Code 1884, § 2406. TEXAS: Rev. St. 1895, art. 3590. VERMONT: St. 1894, § 4279. VIRGINIA: Code 1887, § 2868. WASHINGTON: Gen. St. 1891, § 2920. WEST VIRGINIA: Code 1891, c. 100, § 4. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1708. WYOMING: Rev. St. 1887, § 4072. See Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267; Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957. A certificate of a special partner stated that he contributed goods to a certain amount to the assets of the firm, but it appeared that part of the amount so contributed consisted of a debt of the firm which the special partner held as assignee, and which was afterwards paid to him by the firm. Held, that the certificate was misleading and deceptive, and the special partner was chargeable with the debts of the firm as a general partner. Wilson v. Bean, 33 Ill. App. 529. Though by Act Pa. March 21, 1836, § 8 (P. L. 143), if any false statement is made in the certificate or affidavit in the formation of a limited partnership, all interested are liable as general partners, the intended special partner does not by reason of such false statement become, in fact, a general partner, and failure to give notice of dissolution does not render him liable for the subsequent engagements of the firm. Tilge v. Brooks, 124 Pa. St. 178, 16 Atl. 746.

affixed to that crime.[156] The Florida statute is the same.[157] In Missouri,[158] Kentucky,[159] and Oregon [160] the limited partnership does not begin until the publication is made. Where the partnership is launched before complying with all the requirements of the statute, a partnership exists, but it is a general one.[161] A subsequent compliance will convert it into a limited partnership, unless the statute requires the various steps to be taken at a particular time.

SAME—RENEWALS.

202. A limited partnership is renewed for an additional term in substantially the same manner as it was originally constituted.

Renewals or continuances of a limited partnership beyond the time fixed for its termination must, in most of the states, be certified, acknowledged, recorded, published, and an affidavit of a general partner made, in states where an affidavit is required, in the manner required for an original partnership.[162] And in nearly all states a

[156] Rev. St. 1889, § 7197.

[157] McClel. Dig. 1881, c. 159, § 7.

[158] Rev. St. 1889, § 7198.

[159] St. 1894, c. 94, § 3770.

[160] 2 Hill's Ann. Laws 1892, § 3851.

[161] Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Rosenberg v. Block, 50 N. Y. Super. Ct. 357; McGehee v. Powell, 8 Ala. 827; Gray v. Gibson, 6 Mich. 300; Lancaster v. Choate, 5 Allen (Mass.) 530; Gearing v. Carroll, 151 Pa. St. 79, 24 Atl. 1045. Where C. and H., who were trading as C. & Co., were sued as general partners, an affidavit of defense, filed by H., that he and C. had formed, according to law, a limited partnership, in which he was the special partner, and that he had done nothing to render himself liable generally, but which did not say that the requisite sign was posted on their place of business, was insufficient to prevent judgment. Bergner & Engel Brewing Co. v. Cobb, 12 Pa. Co. Ct. R. 460.

[162] ALABAMA: Code 1886, § 1716. ARKANSAS: Sand. & H. Dig. 1894, § 5458. CALIFORNIA: Civ. Code 1886, § 2485. CONNECTICUT: Gen. St. 1888, § 3281. DAKOTA: Comp. Laws 1887, § 4080. DELAWARE: Rev. Code 1874, c. 64, § 3. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 13. GEORGIA: Code 1882, § 1930. IDAHO: Rev. St. 1887, § 3278. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 11. INDIANA: Rev. St. 1894, § 8114. IOWA: McClain's Code 1888, § 3340. KANSAS: Gen. St. 1889, par. 3988. KENTUCKY: St. 1894, c. 94, § 3772. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 9. MASSACHUSETTS: Pub. St. 1882, c. 75, § 7. MICHIGAN: How. Ann. St. 1882, § 2352. MINNESOTA: Gen.

partnership not thus renewed or continued will be deemed general.[163] This is expressly stated in some states, but it is implied in all. Some

St. 1894, § 2340. MISSISSIPPI: Code 1892, § 2775. MISSOURI: Rev. St. 1889, § 7200. MONTANA: Civ. Code 1895, § 3298. NEBRASKA: Cobbey's Consol. St. 1891, § 3241. NEVADA: Gen. St. 1885, § 4910. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 9. NEW JERSEY: Gen. St. 1895, "Partnership," § 11. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 11. NORTH CAROLINA: Code 1883, § 3098. NORTH DAKOTA: Rev. Code 1895, § 4424. OHIO: Rev. St. 1892, § 3148. OREGON: 2 Hill's Ann. Laws 1892, § 3852. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," 13. RHODE ISLAND: Gen. Laws 1896, c. 157, § 6. SOUTH CAROLINA: Rev. St. 1893, § 1417. TENNESSEE: Mill. & V. Code 1884, § 2409. TEXAS: Rev. St. 1895, art. 3593. UTAH: Comp. Laws 1888, § 2483. VERMONT: St. 1894, § 4281. VIRGINIA: Code 1887, § 2869. WASHINGTON: Gen. St. 1891, § 2921. WEST VIRGINIA: Code 1891, c. 100, § 6. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1711. WYOMING: Rev. St. 1887, § 4077. If the statement in the renewal certificate as to amount of capital contributed to the renewed partnership is false, the partnership continues as a general partnership. Fifth Ave. Nat. Bank v. Colgate, 55 N. Y. Super. Ct. 541; Merchants' & Traders' Bank v. Colgate, Id. 568. The certificate and affidavit of renewal should truly state what capital belonging to the special partner remained in the old firm to be used by the new firm, and that, therefore, evidence is admissible to show the falsity of such statement. Fifth Ave. Bank v. Colgate, 54 N. Y. Super. Ct. 188. A partner in commendam contributed $40,000 to the partnership funds. Before the expiration of the partnership, the term was extended. At that time all the capital of the firm had been lost, except $7,000 of the money advanced by the partner in commendam. Held, that under Rev. Civ. Code La. art. 2842, which limits the liability of a partner in commendam to the sum which he agrees to contribute, such partner was not liable for the deficiency of $33,000; the extension not being the creation of a new partnership, and there being, therefore, no agreement to furnish a further sum, or to make good the loss on the sum originally contributed. Arnold v. Danziger, 30 Fed. 898.

[163] ALABAMA: Code 1886, § 1716. ARKANSAS: Sand. & H. Dig. 1894, § 5458. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 14. GEORGIA: Code 1882, § 1930. IDAHO: Rev. St. 1887, § 3291. INDIANA: Rev. St. 1894, § 8114. IOWA: McClain's Code 1888, § 3340. KANSAS: Gen. St. 1889, par. 3988. MAINE: Rev. St. 1883, c. 33, § 5. MARYLAND: Code 1888, art. 73, § 9. MICHIGAN: How. Ann. St. 1882, § 2352. MINNESOTA: Gen. St. 1894, § 2340. MISSISSIPPI: Code 1892, § 2776. MISSOURI: Rev. St. 1889, § 7200. MONTANA: Civ. Code 1895, § 3298. NEBRASKA: Cobbey's Consol. St. 1891, § 3241. NEVADA: Gen. St. 1885, § 4910. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 9. NEW JERSEY: Gen. St. 1895, "Partnership," § 11. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 11. NORTH CAROLINA: Code 1883, § 3098. OHIO: Rev.

of the statutes make slight changes in the provisions for renewals. Thus, in Tennessee, no publication of such renewal is required,

St. 1892, § 3148. OREGON: 2 Hill's Ann. Laws 1892, § 3852. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 13. RHODE ISLAND: Gen. Laws 1896, c. 157, § 6. SOUTH CAROLINA: Rev. St. 1893, § 1417. TENNESSEE: Mill. & V. Code 1884, § 2409. TEXAS: Rev. St. 1895, art. 3593. UTAH: Comp. Laws 1888, § 2483. VERMONT: St. 1894, § 4281. VIRGINIA: Code 1887, § 2869. WASHINGTON: Gen. St. 1891, § 2921. WEST VIRGINIA: Code 1891, c. 100, § 6. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1711. WYOMING: Rev. St. 1887, § 4090. See Haggerty v. Taylor, 10 Paige (N. Y.) 261; Hirsch v. Vanuxem, 15 Wkly. Notes Cas. 467; Tindal v. Park, 154 Pa. St. 36, 26 Atl. 300. Where, under the act of 1836, it is sought to renew a limited partnership during the period between the expiration of the old firm and the date of renewal, such partnership is general, and the special partners are liable for all debts. Haddock v. Manufacturing Corp., 109 Pa. St. 372, 1 Atl. 174. If a limited partnership is renewed, with the capital contributed originally by the special partners impaired, the latter are liable as general partners. Fourth St. Nat. Bank v. Haines, 3 Pa. Dist. R. 437. Where the amount of capital contributed by special partners is still in the business, and its form is properly set out in the renewal certificate, special partners are not liable as general partners, though there may be some debts outstanding against the firm. Reitzel v. Haines, Id. 523. Since the impairment of the special capital at the time of the partnership's renewal makes each partner liable generally, an averment that at such time it was entirely consumed is one that its owners must specifically deny in their affidavit of defense. Siegel v. Wood, Id. 463. Where a certificate of renewal, which is ineffectual because it recites a change in the names of the general partners, is filed, the partners are not estopped to deny that they constitute a limited partnership, if there is not evidence that any creditor gave credit to the firm as being a limited partnership, or in any way acted on the faith of any representations that it was such. Hardt v. Levy, 72 Hun, 225, 25 N. Y. Supp. 248. An attempted renewal, which is ineffectual because the certificate recites the introduction of a new general partner, cannot create a new limited partnership where the recital of the certificate as to the contribution of the special partner is that the whole amount contributed by him remains in the partnership, as the statute requires the contribution of the special partner to be paid in cash. Hardt v. Levy, 72 Hun, 225, 25 N. Y. Supp. 248. The capital originally contributed by special partners to a limited partnership is not, on renewal, "unimpaired and undiminished," though the partnership has merchandise to more than that amount, where it is in fact insolvent. Special partners are, in case of a false statement in the certificate on renewal of a limited partnership, that their contribution remained unimpaired and undiminished, liable on notes of the partnership given after such renewal in place of matured notes issued before the renewal. Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100. A special partner's liability as general partner, by

though required in the first instance.[164] In Connecticut publication for two weeks only is enough.[165] In several states no affidavit is required in case of renewal.[166] In North Carolina the affidavit may state that the cash was originally paid in, and has not been impaired, but is represented by stock.[167] In Missouri the new statement must set forth that the books of the firm have been balanced, and the balance of profit or loss, as the case may be, ascertained, and also the amount to the credit of the special partners on said books.[168] In New Hampshire the renewal must be made within 30 days after the dissolution.[169]

RIGHTS AND LIABILITIES.

203. Unless otherwise provided for by statute, the members of a limited partnership are subject to all the liabilities, and entitled to all the rights, of general partners. Questions peculiar to limited partnerships will be considered under the following heads:

(a) Liability for debts (p. 456).

(b) Defective or delayed formation (p. 458).

(c) Rights in firm property (p. 461).

(d) Withdrawal of capital (p. 463).

(e) Alteration (p. 468).

(f) Interference (p. 472).

reason of a false statement, in the certificate on renewal of a limited partnership, that the capital contributed by special partners remained unimpaired and undiminished, is not affected by the fact that he believed the statement to be true; Act 1836 declaring all parties liable as general partners "if any false statement be made in such certificate." Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103.

164 Mill. & V. Code 1884, § 2409.

165 Gen. St. 1888, § 3281.

166 CONNECTICUT: Gen. St. 1888, § 3281. KENTUCKY: St. 1894, c. 94, § 3772. VIRGINIA: Code 1887, § 2869. WEST VIRGINIA: Code 1891, c. 100, § 6.

167 Code 1883, § 3098.

168 Rev. St. 1889, § 7200.

169 Laws 1879, c. 15.

SAME—LIABILITY FOR DEBTS.

204. The liability of the general partners to creditors is the same as in ordinary partnerships.

205. Where all statutory requirements have been complied with, special partners are not personally liable for any debts of the partnership.

In some states the statutes provide that the special partners shall not be personally liable for the debts of the partnership;[170] in others, the provision is that they shall not be liable beyond the fund contributed by them to the capital.[171] The meaning is the same in either case. In Georgia[172] and Pennsylvania[173] the statute pro-

[170] DELAWARE: Rev. Code 1874, c. 64, § 2. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 2. INDIANA: Rev. St. 1894, § 8110. KENTUCKY: St. 1894, c. 94, § 3768. MASSACHUSETTS: Pub. St. 1882, c. 75, § 2. MISSOURI: Rev. St. 1889, § 7196. MONTANA: Civ. Code 1895, § 3331. NEVADA: Gen. St. 1885, § 4906. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 2. OHIO: Rev. St. 1892, § 3142. OREGON: 2 Hill's Ann. Laws 1892, § 3849. RHODE ISLAND: Gen. Laws 1896, c. 157, § 2. VERMONT: St. 1894, § 4277. VIRGINIA: Code 1887, § 2864. WASHINGTON: Gen. St. 1891, § 2918. WEST VIRGINIA: Code 1891, c. 100, § 2.

[171] ALABAMA: Code 1886, § 1706. ARKANSAS: Sand. & H. Dig. 1894, § 5448. CALIFORNIA: Civ. Code 1886, § 2501. COLORADO: Mills' Ann. St. 1891, § 3370. CONNECTICUT: Gen. St. 1888, § 3277. DAKOTA: Comp. Laws 1887, § 4091. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 4. FLORIDA: McClel. Dig. 1881, c. 159, § 1. GEORGIA: Code 1882, § 1921. IDAHO: Rev. St. 1887, § 3288. KANSAS: Gen. St. 1889, par. 3978. MAINE: Rev. St. 1883, c. 33, § 1. MARYLAND: Code 1888, art. 73, § 2. MINNESOTA: Gen. St. 1894, § 2331. MISSISSIPPI: Code 1892, § 2765. NEBRASKA: Cobbey's Consol. St. 1891, § 3232. NEW JERSEY: Gen. St. 1895, "Partnership," § 2. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 2. NORTH CAROLINA: Code 1883, § 3089. NORTH DAKOTA: Rev. Code 1895, § 4435. OHIO: Rev. St. 1892, § 3142. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 2. SOUTH CAROLINA: Rev. St. 1893, § 1408. TEXAS: Rev. St. 1895, art. 3584. UTAH: Comp. Laws 1888, § 2474. WYOMING: Rev. St. 1887, § 4087. Cf. Lachomette v. Thomas, 5 Rob. (La.) 172; Wisner v. Ocumpaugh, 71 N. Y. 113. As to the liability of a special partner for trespass committed by an agent of the firm, see McKnight v. Ratcliff, 44 Pa. St. 156.

[172] Code 1882, § 1934.

[173] Pepper & L. Dig. 1894, "Limited Partnership," § 21.

vides that special partners contributing capital shall not be liable for debts previously contracted by the general partners. Every partner guilty of fraud in partnership affairs is liable civilly to the person injured to the extent of his damage,[174] and also, in many states, to an indictment as for a misdemeanor.[175] Liability as a general partner is the penalty for most violations of the provisions of the limited partnership acts.[176]

[174] ALABAMA: Code 1886, § 1724. ARKANSAS: Sand. & H. Dig. 1894, § 5466. FLORIDA: McClel. Dig. 1881, c. 159, § 15. GEORGIA: Code 1882, § 1938. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 21. IOWA: McClain's Code 1888, § 3348. KANSAS: Gen. St. 1889, par. 3994. MARYLAND: Code 1888, art. 27, § 118. NEBRASKA: Cobbey's Consol. St. 1891, § 3249. NEW JERSEY: Gen. St. 1895, "Partnership," § 19. NORTH CAROLINA: Code 1883, § 3106. OHIO: Rev. St. 1892, § 3155. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 25. SOUTH CAROLINA: Rev. St. 1893, § 1423. TENNESSEE: Mill. & V. Code 1884, § 2417. TEXAS: Rev. St. 1895, art. 3600. WISCONSIN: Sanb. & B. Ann. St. § 1724.

[175] ARKANSAS: Sand. & H. Dig. 1894, § 5466. CALIFORNIA: Pen. Code 1886, § 358. DAKOTA: Comp. Laws 1887, § 6626. FLORIDA: McClel. Dig. 1881, c. 159, § 15. GEORGIA: Code 1882, § 1938. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 21. IOWA: McClain's Code, 1888, § 3348. KANSAS: Gen. St. 1889, par. 3994. MARYLAND: Code 1888, art. 27, § 118. MINNESOTA: Gen. St. 1894, § 2352. NEBRASKA: Cobbey's Consol. St. 1891, § 3249. NEW JERSEY: Gen. St. 1895, "Partnership," § 19. NORTH CAROLINA: Code 1883, § 3106. NORTH DAKOTA: Rev. Code 1895, § 7271. PENNSYLVANIA: Laws 1885, Acts Nos. 38, 49. TENNESSEE: Mill. & V. Code 1884, § 2417.

[176] See post, pp. 463, 468, 472, 478. As to when executions can be taken out against individual property, see Whitall v. Williams, 6 Wkly. Notes Cas. 44. A special partner, who makes such representations to any parties as to his interest in his firm, his responsibility, and his share of its profits as to lead them to suppose he is personally liable as a general partner, and to induce them thereby to sell goods to his firm, will be held liable as a general partner for all purchases so made of said parties after the date of those representations. Barrows v. Downs, 9 R. I. 446. Where a limited partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual, and not of the partners. And the plaintiff, in order to recover against the partners, must not only prove the execution of the note, but go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership, or that when obtained it was used in the business of the partnership. Oliphant v. Mathews, 16 Barb. (N. Y.) 608.

SAME—DEFECTIVE OR DELAYED FORMATION.

206. The effect of defects or delays in the formation of a limited partnership will be considered

(a) With reference to the partners themselves (p. 458).

(b) With reference to third persons (p. 459).

207. EFFECT INTER SE—If the parties "intend that a special partnership shall exist, they will be bound to observe their mutual understanding amongst themselves."

It has been seen [177] that, if the business of the partnership is launched before compliance with the statutory requirements, the statutory protection is lost, and all the partners are liable as general partners. It has also been seen [178] that the theory underlying the limited partnership acts is the protection of the public. The statute does not take away the liberty of contract of the partners. As between themselves, their rights are fixed by the contract they have made, although, by reason of noncompliance with the statute, they are all liable as general partners to third persons. If they "intend that a special partnership shall exist, they will be bound to observe their mutual understanding amongst themselves." [179] In Robinson v. McIntosh [180] it was said that it is by no means clear that, although one has not so complied with the statute as to entitle himself to the immunities provided for a special partner, he may not have subjected himself to all the disabilities which the statute annexes to that character.[181] In Lancaster v. Choate [182] it was said:

[177] Ante, p. 450.

[178] Ante, p. 422.

[179] Patterson v. Holland, 6 Grant, Ch. (U. C.) 414, 417. Cf. Id., 7 Grant, Ch. (U. C.) 1.

[180] 5 E. D. Smith (N. Y.) 221, 233, 234.

[181] Cf. Whilldin v. Bullock, 4 Wkly. Notes Cas. 234, and Hogg v. Ellis, 8 How. Prac. (N. Y.) 473, where it was said: "The limited partner is a partner as much as the general partner, and there is nothing to prevent him, even during the continuance of the partnership, from taking an active part in its concerns, if he chooses to bring on himself the statutory consequences of a liability as a general partner. The statute is for his protection if he will conform to it. It is not any

[182] 5 Allen (Mass.) 530, 539.

"We do not intend, however, to say that the agreement of partnership has no validity; for, as between themselves, all their settlements must be in conformity with it;" and in Whittemore v. Macdonell [183] it was said that a special partner, by interference, merely incurs the liability of a general partner, without acquiring his authority. Where the liability of the special partner as a general one results from the acts of the general partners, they are estopped to take advantage of it; and, as to them, the partnership is limited.[184]

208. EFFECT AS TO THIRD PERSONS—Where the partnership is launched before the statutory requirements are complied with, all the partners are liable to third persons as general partners.

209. Where the organization as a limited partnership is subsequently perfected, notice must be given precisely as in the case of the retirement of a partner in an ordinary partnership.

It is perhaps unnecessary to say more upon the point that, when the business is launched before the statutory requirements are com-

part of its policy to prevent him from acting as a general partner, if he is willing to assume the liabilities that follow; and, if he is willing, his partners have no ground of complaint, nor the creditors of the firm, if he leave their rights unimpaired. It would be different if the general partners, by their articles, excluded the limited partner from a control, but then this restriction might cease at the expiration of the partnership. The statute as to the special partner is that 'if he shall interfere, contrary to these provisions, he shall be deemed a general partner' (1 Rev. St. p. 766, § 17), and that is the only penalty."

[183] 6 U. C. C. P. 547. And see Abendroth v. Van Dolsen, 131 U. S. 66, 9 Sup. Ct. 619; Waters v. Harris (Super. N. Y.) 17 N. Y. Supp. 370. An agreement for the formation of a limited partnership, executed under the laws of New York, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the parties named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners. Gray v. Gibson, 6 Mich. 300.

[184] Durant v. Abendroth, 97 N. Y. 132; Brown v. Davis, 6 Duer (N. Y.) 549; Hogg v. Ellis, 8 How. Prac. (N. Y.) 473; Lancaster v. Choate, 5 Allen (Mass.) 530; Guillow v. Peterson, 89 Pa. St. 163; Patterson v. Holland, 6 Grant, Ch. (U. C.) 414, 417.

plied with, the partners are all liable as general partners. The exemption from liability being wholly statutory, it is incumbent upon one claiming the protection of the statute to bring himself within its terms. If the organization is not perfected, the intended special partner is a dormant or secret partner,[185] unless, by active participation in the firm business, he becomes an ostensible one.[186]

The change from a general partnership, created under these circumstances, to a limited partnership, effected by completing the steps prescribed by statute, is not regarded as the dissolution of one firm, and the formation of another; for no new contribution of cash capital is required, and there is no distinction between the creditors of the general partnership and those of the limited one, except in so far as the liability of the special partner is concerned.[187] But notice of such change of liability must be given as in the case of the retirement of a partner in a general partnership, for the change from a general to a special partner amounts substantially to a retirement. The rules as to notice under such circumstances apply, mutatis mutandis, here. Thus, if the special partner has remained dormant, no notice either to former dealers or to the public is necessary.[188] If the fact that he is a partner has been made known in any way to one dealing with the firm, such person is

185 Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Gray v. Gibson, 6 Mich. 300; Lachomette v. Thomas, 5 Rob. (La.) 172.

186 Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Tournade v. Hagedorn, 5 Thomp. & C. (N. Y.) 288; Gray v. Gibson, 6 Mich. 300; Lachomette v. Thomas, 5 Rob. (La.) 172; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16. In case of a defective formation, a creditor who knew of the attempted creation of a limited partnership can, nevertheless, hold the special partner as a general one. Eliot v. Himrod, 16 Wkly. Notes Cas. 189; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Manhattan Brass Co. v. Allin, 35 Ill. App. 336. If, in an attempt to form a limited partnership, a special partner fails to put in the capital agreed upon, he is liable generally, and a complaint in an action against such partners need only allege a partnership in the ordinary form, and proof of the circumstances rendering such special partner liable as a general partner may be introduced on the trial. Sharp v. Hutchinson, 100 N. Y. 533, 3 N. E. 500. Cf. Stone v. De Puya, 4 Sandf. (N. Y.) 681; Rosenberg v. Block, 50 N. Y. Super. Ct. 357. One who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective. Allegheny Nat. Bank v. Bailey, 147 Pa. St. 111, 23 Atl. 439.

187 Bates, Lim. Partn. § 76.

188 See ante, p. 264.

entitled to actual notice.[189] If the fact is made known generally, the public is entitled to constructive notice by publication, and former dealers to actual notice.[190]

SAME—RIGHTS IN FIRM PROPERTY.

210. The special partner has an interest in firm property amounting to an equitable title.

There have been many attempts to define the nature of the interest, if any, that a special partner has in the firm property, by likening it to other recognized legal relations. None of these attempts have been wholly satisfactory, perhaps for the reason that the special partner's interest is sui generis.[191] In some cases it is said that the special partner has no interest as part owner of the property. In one case it was said: "The position of a special partner is very analogous to that of the holders of stock in an incorporated company."[192] A limited partnership is "a kind of quasi corporation."[193] In another case the interest was said to be more in the nature of a debt than like corporate stock.[194] In this last case it was said: "The interest of Harris [the special partner] in the property of a limited partnership can hardly be said to be an interest in the property of the firm. He advanced to the firm a sum of money which he is entitled to receive back, with interest, at the termination of the partnership. He is also entitled to a share in the profits. But he is to no further extent the owner of the property. Upon payment of these claims, the property would

189 See ante, p. 261. 190 See ante, p. 264.

191 As to the position of the special partner, Mr. James Parsons says (Partn. p. 86): "The courts took the statutory language, and spelt out the word N, O, N, D, E, S, C, R, I, P, T, for the special partner. They did not classify him as a partner, except to victimize him for the nonobservance of any trifling formality, but they treated him as an anomaly in law. If the legislature had not enacted him a partner, the profession would have made him a creditor. As it is, he runs the gauntlet of the profession." As to the general partner's power to transfer firm property, see Locke v. Lewis, 124 Mass. 1.

192 Whittemore v. MacDonell, 6 U. C. C. P. 547, 551.

193 Hayes v. Bement, 3 Sandf. (N. Y.) 394, 397.

194 Harris v. Murray, 28 N. Y. 574, 582. And see, to the same effect, Bradbury v. Smith, 21 Me. 117.

belong to the general partners." In this same case, Denio, J., said: "If the interest in question was embraced under the denomination of evidences of debt or of debts, there was a positive inhibition against selling it on execution. If it was a right or share in the stock of a corporation or association, it might be thus sold. In my opinion, it was in the nature of the interest first mentioned, and not of corporate stock. It was a sum of money invested in the partnership enterprise, to be reimbursed, if not lost in the business, at the end of the period during which the partnership business was to continue, with any profits which had been earned, and which had not been divided. It was not payable in præsenti, and probably not, in strictness of language, a debt at all. But it was merely held in trust for the special partner to be employed in the business mentioned in the articles, and finally returned to the special partner, unless lost by the exigencies of the business." So, in a Pennsylvania case [195] the contribution of the special partner was said to be in the nature of a trust. Mr. Bates says [196] that the doctrine that the special partner has no interest whatever in the property, or is a mere creditor, is entirely wrong. Upon the whole, the true view seems to be that the special partner has no legal title to the firm property, but he has an equitable interest or claim therein. This claim takes priority over the claims of individual creditors of the general partners,[197] but is postponed to the claims of creditors of the partnership. This is sometimes expressed by saying that the special partner is a creditor of the firm for so much capital, with the usual partner's lien, which gives him priority over all individual creditors of his co-partners; but he can have no greater right in the property than those of a general partner.

[195] Coffin's Appeal, 106 Pa. St. 280. [196] Lim. Partn. § 70.

[197] Cf. ante, p. 283. If, upon the dissolution of a partnership, general or limited, the retiring partner bona fide assigns all his interest in the stock and effects to the remaining partner, the same becomes separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner. Upson v. Arnold, 19 Ga. 190. A judgment confessed by one partner to another, to secure the amount of the capital stock advanced by such partner, who had agreed to enter into a special partnership, but became a general partner by reason of noncompliance with the requisitions of the act of assembly, is valid against a separate creditor of the partner who confessed the judgment. Purdy v. Lacock, 6 Pa. St. 490.

SAME—WITHDRAWAL OF PROFITS OR CAPITAL.

211. No part of the sum contributed by any special partner to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership. But any partner may annually receive lawful interest on the sum so contributed by him if the payment thereof does not reduce the original capital.

212. The penalty prescribed by statute for violation of the above rule is

(a) In most states, merely liability to restore the amount withdrawn, generally with interest (p. 466).

(b) In some states, liability as a general partner (p. 466).

The above prohibition against withdrawals is substantially the same in all states.[198] The express permission to receive lawful in-

[198] ALABAMA: Code 1886, § 1720. ARKANSAS: Sand. & H. Dig. 1894, § 5462. CALIFORNIA: Civ. Code 1886, § 2493. COLORADO: Mills' Ann. St. 1891, § 3379. CONNECTICUT: Gen. St. 1888, § 3283. DAKOTA: Comp. Laws 1887, § 4086. DELAWARE: Rev. Code 1874, c. 64, § 5. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 21. FLORIDA: McClel. Dig. 1881, c. 159, § 11. GEORGIA: Code 1882, § 1934. IDAHO: Rev. St. 1887, §§ 3283, 3284. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 18. INDIANA: Rev. St. 1894, § 8116. IOWA: McClain's Code 1888, § 3344. KANSAS: Gen. St. 1889, par. 3991. KENTUCKY: St. 1894, c. 94, § 3774. MAINE: Rev. St. 1883, c. 33, § 7. MARYLAND: Code 1888, art. 73, § 13. MASSACHUSETTS: Pub. St. 1882, c. 75, § 8. MICHIGAN: How. Ann. St. 1882, § 2355. MINNESOTA: Gen. St. 1894, § 2344. MISSISSIPPI: Code 1892, § 2772. MONTANA: Civ. Code 1895, § 3314. NEBRASKA: Cobbey's Consol. St. 1891, § 3245. NEVADA: Gen. St. 1885, § 4912. NEW HAMPSHIRE: Gen Laws 1878, c. 118, § 12. NEW JERSEY: Gen. St. 1895, "Partnership," § 15. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 15. NORTH CAROLINA: Code 1883, § 3102. NORTH DAKOTA: Rev. Code 1895, § 4430. OHIO: Rev. St. 1892, § 3151. OREGON: 2 Hill's Ann. Laws 1892, § 3854. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 21. RHODE ISLAND: Gen. Laws 1896, c. 157, § 9. SOUTH CAROLINA: Rev. St. 1893, § 1430. TENNESSEE: Mill. & V. Code 1884, § 2413. TEXAS: Rev. St.

terest, provided it does not reduce the original capital,[199] seems unnecessary, and does not appear in all the statutes; and the same may be said of the provision, which occurs in the statutes of several states, that, where profits are actually earned, the special partner may receive his proportion.[200]

What is a Withdrawal.

The term "withdrawal," in this connection, has acquired a technical significance. It does not mean the withdrawal of the person

1895, art. 3597. UTAH: Comp. Laws 1888, § 2487. VERMONT: St. 1894, § 4283. VIRGINIA: Code 1887, § 2872. WASHINGTON: Gen. St. 1891, § 2923. WEST VIRGINIA: Code 1891, c. 100, § 8. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1714. WYOMING: Rev. St. 1887, §§ 4082, 4083.

[199] ALABAMA: Code 1886, § 1720. ARKANSAS: Sand. & H. Dig. 1894, § 5462. CALIFORNIA: Civ. Code 1886, § 2494. DAKOTA: Comp. Laws 1887, § 4087. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 21. FLORIDA: McClel. Dig. 1881, c. 159, § 11. GEORGIA: Code 1882, § 1934. IDAHO: Rev. St. 1887, § 3284. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 18. INDIANA: Rev. St. 1894, § 8116. IOWA: McClain's Code 1888, § 3344. MARYLAND: Code 1888, art. 73, § 13. MISSISSIPPI: Code 1892, § 2772. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 7. NEW JERSEY: Gen. St. 1895, "Partnership," § 15. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 15. NORTH CAROLINA: Code 1883, § 3102. NORTH DAKOTA: Rev. Code 1895, § 4431. OHIO: Rev. St. 1892, § 3151. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 21. SOUTH CAROLINA: Rev. St. 1893, § 1430. TENNESSEE: Mill. & V. Code 1884, § 2413. TEXAS: Rev. St. 1895, art. 3597. WASHINGTON: Gen. St. 1891, § 2923. WYOMING: Rev. St. 1887, § 4083.

[200] ALABAMA: Code 1886, § 1720. ARKANSAS: Sand. & H. Dig. 1894, § 5462. CALIFORNIA: Civ. Code 1886, § 2494. DAKOTA: Comp. Laws 1887, § 4087. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 21. FLORIDA: McClel. Dig. 1881, c. 159, § 11. GEORGIA: Code 1882, § 1934. IDAHO: Rev. St. 1887, § 3284. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 18. IOWA: McClain's Code 1888, § 3344. KANSAS: Gen. St. 1889, par. 3991. MARYLAND: Code 1888, art. 73, § 13. MISSISSIPPI: Code 1892, § 2772. NEW JERSEY: Gen. St. 1895, "Partnership," § 15. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 15. NORTH CAROLINA: Code 1883, § 3102. NORTH DAKOTA: Rev. Code 1895, § 4431. OHIO: Rev. St. 1892, § 3151. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 21. SOUTH CAROLINA: Rev. St. 1893, § 1430. TENNESSEE: Mill. & V. Code 1884, § 2413. TEXAS: Rev. St. 1895, art. 3597. UTAH: Comp. Laws 1888, § 2487. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1714. WYOMING: Rev. St. 1887, § 4083.

from the firm, or the sale of an interest to a co-partner or a stranger. Such acts constitute what is known as "alteration." [201] The term "withdrawal" is confined simply to an excessive division of profits. "Withdrawal refers to the division of profits to the special partner which the actual earnings cannot afford, and which are therefore an encroachment on the special capital." [202]

It is quite possible that a withdrawal may take place without any of the partners so intending, for it is impossible to know absolutely the condition of the capital of a firm having numerous and large transactions at any given time, so much depending upon the solvency of debtors and other similar considerations. So it is possible that a withdrawal may be made without the special partner's knowledge. This would occur if lands were purchased with part-

[201] See post, p. 468. And cf. Beers v. Reynolds, 12 Barb. (N. Y.) 288.

[202] Bates, Lim. Partn. § 83. The fact that part of the required capital of a limited partnership association is withdrawn from the bank where it has been deposited before the organization is completed does not impair the validity of the organization, unless it is also withdrawn from the association. Masters v. Lauder, 131 Pa. St. 195, 18 Atl. 872. Where a special partner, at the end of the period for which the partnership is formed, leaves all his capital and all the assets of the firm in the hands of the general partners on their agreement to pay him the amount of his interest in the firm, which they fail to do, he does not thereby withdraw his capital from the firm, within the meaning of 1 Rev. St. p. 766, § 15, so as to render him liable for firm debts. George v. Carpenter, 73 Hun, 221, 25 N. Y. Supp. 1086. Where the special partner pays in unconditionally the sum specified, and at the same time the certificate is duly signed and sworn to, and then the moneys so contributed are paid away for the purposes of the firm, and after that, on the same day, the certificate is duly filed, a limited co-partnership is legally constituted, if the transaction was bona fide, and it was not necessary that the contributed capital should be in hand at the time of the filing of the certificate. Vernon v. Brunson, 54 N. J. Law, 586, 25 Atl. 511. A mere expectation that the capital of the partnership would be employed to purchase the stock of an immediately preceding firm does not deprive the former of its character as a limited partnership; for, in the absence of an actual agreement to that effect when the capital was contributed, the partnership would be at liberty to use its capital, when it was received, in that or any other direction. Metropolitan Nat. Bank v. Palmer, 56 Hun, 641, 9 N. Y. Supp. 239. Upon the formation of a limited partnership to carry on a business already being carried on by one of the partners, an agreement that the money paid in by the limited partner shall be applied in payment of debts due for stock already on hand is neither against public policy, nor contrary to the provisions of 2 Starr & C. Ann. St. 111, c. 84, relating to limited partnerships. Anderson v. Stone 24 Ill. App. 342.

nership funds, and the title taken in the name of the special partner jointly with the others.[203] If the special partner borrows the money which he contributes, and the firm subsequently assumes this debt, the transaction constitutes a withdrawal.[204]

Penalty for Withdrawal.

In most states the only penalty provided by statute for disobedience of the provision forbidding withdrawals is the return of the amount withdrawn.[205] This is obviously the only consequence that can be justly imposed where the withdrawal was unintentional and in good faith. But, as the withdrawal is expressly forbidden, it seems that an intentional violation of the statute in this regard will impose liability as a general partner, although the only penalty named in the statute is the restoration of the amount with-

[203] Madison County Bank v. Gould, 5 Hill (N. Y.) 309.

[204] Coffin's Appeal, 106 Pa. St. 280. Cf. Beers v. Reynolds, 12 Barb. (N. Y.) 288; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610. Nor is a loan made by the firm to the special partner, conceded to be such, and proved to have been repaid with interest, a violation of that provision of the statute which prohibits a withdrawal, by any special partner, of any portion of the sum contributed by him to the stock of the company. Hogg v. Orgill, 34 Pa. 344.

[205] ALABAMA: Code 1886, § 1721. ARKANSAS: Sand. & H. 1894, § 5463. COLORADO: Mills' Ann. St. 1891, § 3379. DELAWARE: Rev. Code 1874, c. 64, § 5. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 22. FLORIDA: McClel. Dig. 1881, c. 159, § 12. GEORGIA: Code 1882, § 1935. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 18. INDIANA: Rev. St. 1894, § 8116. IOWA: McClain's Code 1888, § 3345. KANSAS: Gen. St. 1889, par. 3991. KENTUCKY: St. 1894, c. 94, § 3774. MAINE: Rev. St. 1883, c. 33, § 7. MARYLAND: Code 1888, art. 73, § 14. MASSACHUSETTS: Pub. St. 1882, c. 75, § 8. MICHIGAN: How. Ann. St. 1882, § 2355. MINNESOTA: Gen. St. 1894, § 2344. MISSISSIPPI: Code 1892, § 2772. MONTANA: Comp. St. 1888, div. 5, § 1603. NEBRASKA: Cobbey's Consol. St. 1891, § 3246. NEVADA: Gen. St. 1885, § 4912. NEW JERSEY: Gen. St. 1895, "Partnership," § 16. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 16. NORTH CAROLINA: Code 1883, § 3103. OHIO: Rev. St. 1892, § 3152. OREGON: 2 Hill's Ann. Laws 1892, § 3854. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 22. RHODE ISLAND: Gen. Laws 1896, c. 157, § 9. TENNESSEE: Mill. & V. Code 1884, § 2414. TEXAS: Rev. St. 1895, art. 3598. UTAH: Comp. Laws 1888, § 2488. VERMONT: St. 1894, § 4283. VIRGINIA: Code 1887, § 2872. WASHINGTON: Gen. St. 1891, § 2923. WEST VIRGINIA: Code 1891, c. 100, § 8. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1715.

drawn.[206] "The receipt by the special partner of dividends as a device to withdraw capital will render him liable as a general partner; but dividends may be paid to him in good faith, with only the effect to require him to restore in case the capital shall thereby be unintentionally reduced." [207] In several states the statutes provide that, in case of a withdrawal, the special partner shall be liable as a general one.[208] These statutes are broad enough to cover an innocent withdrawal.

Remedy for Withdrawal.

Very few of the statutes provide how the liability of the special partner to return amounts withdrawn is to be enforced. In such cases the ordinary principles of partnership apply. No action at law can be maintained between the partners involving a partnership accounting. The return can be enforced only by a bill in equity for a dissolution and an accounting, subject to usual exceptions. Creditors must first pursue the general partners to insolvency before they can proceed against the special partner.[209] But, in equity, the special partner may be joined with the general partners, and thus forced to refund.[210]

206 Madison County Bank v. Gould, 5 Hill (N. Y.) 309. A special partner who, in violation of the statutes, withdraws the capital contributed by him or any profits from the firm, and thereby reduces its original capital, is not only liable to be treated as a general partner, but may also be compelled to account in a proper action for the moneys so received, as being held by him as a trustee for the benefit of the creditors of the firm. Bell v. Merrifield, 28 Hun (N. Y.) 219.

207 Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610.

208 CALIFORNIA: Civ. Code 1886, § 2495. DAKOTA: Comp. Laws 1887, § 4088. IDAHO: Rev. St. 1887, § 3285. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 7. NORTH DAKOTA: Rev. Code, 1895, § 4432. WYOMING: Rev. St. 1887, § 4084.

209 Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664; Bell v. Merrifield, 28 Hun (N. Y.) 219.

210 Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664.

SAME—ALTERATION.

213. The statutes of most states provide that any alteration in any of the matters stated in the certificate shall be deemed a dissolution of the partnership, and that, if such partnership shall be carried on after such alteration, it shall be deemed a general partnership.

The statutes of most states specifically provide that any alteration in the number or persons of the partners or the nature of the business,[211] or in the capital or shares thereof,[212] or in any other

[211] ALABAMA: Code 1886, § 1717. ARKANSAS: Sand. & H. Dig. 1894, § 5459. CALIFORNIA: Civ. Code 1886, § 2507. DAKOTA: Comp. Laws 1887, § 4094. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 15. GEORGIA: Code 1882, § 1931. IDAHO: Rev. St. 1887, § 3291. IOWA: McClain's Code 1888, § 3341. KANSAS: Gen. St. 1889, par. 3989. KENTUCKY: St. 1894, c. 94, § 3771. MARYLAND: Code 1888, art. 73, § 10. MICHIGAN: How. Ann. St. 1882, § 2353. MINNESOTA: Gen. St. 1894, § 2341. MISSISSIPPI: Code 1892, § 2776. MISSOURI: Rev. St. 1889, § 7199. NEBRASKA: Comp. St. 1893, c. 65, § 12. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 8. NEW JERSEY: Gen. St. 1895, "Partnership," § 12. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. NORTH CAROLINA: Code 1883, § 3099. NORTH DAKOTA: Rev. Code 1895, § 4438. OHIO: Rev. St. 1892, § 3149. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 14. SOUTH CAROLINA: Rev. St. 1893, § 1418. TENNESSEE: Mill. & V. Code 1884, § 2410. TEXAS: Rev. St. 1895, art. 3594. UTAH: Comp. Laws 1888, § 2484. VIRGINIA: Code 1887, § 2870. WEST VIRGINIA: Code 1891, c. 100, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1712. WYOMING: Rev. St. 1887, § 4090.

[212] ALABAMA: Code 1886, § 1717. ARKANSAS: Sand. & H. Dig. 1894, § 5459. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 15. GEORGIA: Code 1882, § 1931. IOWA: McClain's Code 1888, § 3341. KANSAS: Gen. St. 1889, par. 3989. MARYLAND: Code 1888, art. 73, § 10. MICHIGAN: How. Ann. St. 1882, § 2353. MINNESOTA: Gen. St. 1894, § 2341. NEBRASKA: Comp. St. 1893, c. 65, § 12. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 8. NEW JERSEY: Gen. St. 1895, "Partnership," § 12. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. NORTH CAROLINA: Code 1883, § 3099. OHIO: Rev. St. 1892, § 4319. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 14. SOUTH CAROLINA: Rev. St. 1893, § 1418. TEXAS: Rev. St. 1895, art. 3594. UTAH: Comp. Laws 1888,

matter specified in the original certificate,[213] shall be deemed a dissolution of the partnership, and that any partnership carried on after such alteration shall thereupon become general.[214] The proviso "unless it be duly renewed in the manner originally provided"

§ 2484. VIRGINIA: Code 1887, § 2870. WEST VIRGINIA: Code 1891, c. 100, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1712.

[213] ALABAMA: Code 1886, § 1717. ARKANSAS: Sand. & H. Dig. 1894, § 5459. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 15. GEORGIA: Code 1882, § 1931. IOWA: McClain's Code 1888, § 3341. KANSAS: Gen. St. 1889, par. 3989. MARYLAND: Code 1888, art. 73, § 10. MICHIGAN: How. Ann. St. 1882, § 2353. MINNESOTA: Gen. St. 1894, § 2341. MISSISSIPPI: Code 1892, § 2776. NEBRASKA: Comp. St. 1893, c. 65, § 12. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 8. NEW JERSEY: Gen. St. 1895, "Partnership," § 12. NORTH CAROLINA: Code 1883, § 3099. OHIO: Rev. St. 1892, § 3149. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 14. SOUTH CAROLINA: Rev. St. 1893, § 1418. TENNESSEE: Mill. & V. Code 1884, § 2410. TEXAS: Rev. St. 1895, art. 3594. UTAH: Comp. Laws 1888, § 2484. VIRGINIA: Code 1887, § 2870. WEST VIRGINIA: Code 1891, c. 100, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1712.

[214] ALABAMA: Code 1886, § 1717. ARKANSAS: Sand. & H. Dig. 1894, § 5459. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 16. GEORGIA: Code 1882, § 1931. IDAHO: Rev. St. 1887, § 3291. IOWA: McClain's Code, 1888, § 3341. KANSAS: Gen. St. 1889, par. 3989. KENTUCKY: St. 1894, c. 94, § 3771. MARYLAND: Code 1888, art. 73, § 10. MICHIGAN: How. Ann. St. 1882, § 2353. MINNESOTA: Gen. St. 1894, § 2341. MISSISSIPPI: Code 1892, § 2776. MISSOURI: Rev. St. 1889, § 7199. NEBRASKA: Comp. St. 1893, c. 65, § 12. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 8. NEW JERSEY: Gen. St. 1895, "Partnership," § 12. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. NORTH CAROLINA: Code 1883, § 3099. OHIO: Rev. St. 1892, § 4319. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 14. SOUTH CAROLINA: Rev. St. 1893, § 1418. TENNESSEE: Mill. & V. Code 1884, § 2410. TEXAS: Rev. St. 1895, art. 3594. UTAH: Comp. Laws 1888, § 2484. VIRGINIA: Code 1887, § 2869. WEST VIRGINIA: Code 1891, c. 100, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1712. WYOMING: Rev. St. 1887, § 4090. An alteration in the names of the partners, and in the capital or shares of the business, in contravention of the twelfth section of the act authorizing limited partnerships, operates simply as a dissolution. It is only by carrying on the business, after such alteration, that the firm is changed into a general partnership, and the special partner rendered equally liable for the debts. Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610.

is added in the statutes of some states.[215] The statutes of a number of states do not specifically forbid such alterations, or impose any penalties therefor. Nevertheless, it would seem that such prohibition is necessarily implied in all the statutes, as to permit such alteration would defeat their whole object. The making, recording, and publication of a certificate giving notice to the public of facts deemed important for their protection would be futile if the very next day all the facts could be changed by private agreement.

What Constitutes Alteration.

The term "alteration" has acquired a technical significance in this connection, and is used as a convenient term to express a change in any of the matters required to be specified in the certificate, as, for example, in the names or numbers of the partners, nature of the business, the capital, etc.[216] Bona fide loans between the partners as individuals do not constitute an alteration,[217] nor does a loan by the special partner to the firm,[218] though upon security of the firm property.[219] The purchase of claims against the firm is

[215] ALABAMA: Code 1886, § 1717. ARKANSAS: Sand. & H. Dig. 1894, § 5459. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 16. GEORGIA: Code 1882, § 1931. IOWA: McClain's Code 1888, § 3341. KANSAS: Gen. St. 1889, par. 3989. MARYLAND: Code 1888, art. 73, § 10. MICHIGAN: How. Ann. St. 1882, § 2353. MINNESOTA: Gen. St. 1894, § 2341. MISSISSIPPI: Code 1892, § 2776. NEBRASKA: Comp. St. 1893, c. 65, § 12. NEW JERSEY: Gen. St. 1895, "Partnership," § 12. NORTH CAROLINA: Code 1883, § 3099. OHIO: Rev. St. 1892, § 3149. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 14. SOUTH CAROLINA: Rev. St. 1893, § 1418. TENNESSEE: Mill. & V. Code 1884, § 2410. VIRGINIA: Code 1887, § 2870. WEST VIRGINIA: Code 1891, c. 100, § 5. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1712. WYOMING: Rev. St. 1887, § 4090. And see Idaho Rev. St. 1887, § 3291.

[216] Bates, Lim. Partn. § 83.

[217] Hogg v. Orgill, 34 Pa. St. 344. The special partner is not rendered personally liable for the debts of the partnership merely because loans were made to the preceding firm, and by the latter to the partnership for mutual accommodation, on the ground that these transactions constitute a change in the business. Metropolitan Nat. Bank v. Palmer, 56 Hun, 641, 9 N. Y. Supp. 239.

[218] In re Terry, 5 Biss. 110, Fed. Cas. No. 13,836; Walkenshaw v. Perzel, 32 How. Prac. (N. Y.) 233; Vilas Bank v. Bullock, 10 Phila. 309; Rayne v. Terrell, 33 La. Ann. 812.

[219] In re Terry, 5 Biss. 110, Fed. Cas. No. 13,836; Madison County Bank v.

not an alteration.[220] A sale by one partner to another of his interest is an alteration, and renders the special partner thereafter liable as a general one;[221] but it seems that the property passes, and thereby deprives creditors of the limited partnership of their priority over creditors of the continuing partner.[222] If, at the expiration of the term of a limited partnership, it is attempted to renew it, but with a change in the membership, the firm formed is not a renewal of the former limited partnership, but the formation of a new one; for the change in membership is an alteration, and works a dissolution. If, therefore, the statutory requirements for the creation of an original limited partnership, such as the actual payment in cash of the special partner's contribution, are not complied with, all the partners are generally liable.[223]

Special Partner must Participate in Alteration.

In Singer v. Kelly[224] it was held that, under the limited partnership law, a special partner cannot be personally involved, except by his own acts and violation or omission of duty, or by assenting to those of his co-partners when he knows or is presumed to know them; and hence an alteration by the general partners in the nature of the business provided for in the certificate of co-partnership, without the knowledge of the special partner, does not make

Gould, 5 Hill (N. Y.) 309; Walkenshaw v. Perzel, 32 How. Prac. (N. Y.) 233; Lewis v. Graham, 4 Abb. Prac. (N. Y.) 106.

220 Hayes v. Heyer, 35 N. Y. 326.

221 Beers v. Reynolds, 11 N. Y. 97. Where a third person enters the firm as a general partner, the special partnership is dissolved; and if there be a renewal, and not a cash payment by the former and continuing special partner, but the cash paid into the former special partnership remains with the new firm, the special partner becomes a general partner of the new firm. In such cases, knowledge by creditors of the existence of the special partnership agreement, at the time the contracts are made, does not discharge the special partner from his general liability. Andrews v. Schott, 10 Pa. St. 47; Guillon v. Peterson, 89 Pa. St. 163.

222 First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 34; Mattison v. Demarest, 4 Rob. (N. Y) 161; Upson v. Arnold, 19 Ga. 190.

223 Andrews v. Schott, 10 Pa. St. 47; Lineweaver v. Slagle, 64 Md. 465, 2 Atl. 693.

224 44 Pa. St. 145. Where the general partner misappropriates the contribution of a special partner, the latter is not liable as a general partner for the debts of the partnership, where he is not privy to the misappropriation. Seibert v. Bakewell, 87 Pa. St. 506.

him a general partner, so as to render him personally liable to the creditors of the firm. The court said that knowledge or assent of the party to be charged by the acts done was an implied condition of liability. Bates supports this decision upon the ground that an attempted change in the nature of the business without the special partner's consent would be wholly void, as beyond the scope of the general partner's powers, and therefore no real change.[225]

Consequences not Retroactive.

General liability as a penalty for an alteration does not attach retroactively. The alteration effects a dissolution of the limited partnership. If the business is thereafter carried on, all the partners are liable as to such transactions in solido.[226] But, if the alteration also constitutes an interference, the special partner, as will be seen, is liable generally for both prior and subsequent transactions.[227]

SAME—INTERFERENCE.

214. The partnership business must be transacted by the general partners alone, and, if the special partner interferes in the management, he becomes liable as a general partner.

The limited partnership acts are unanimous in excluding the special partner from any part in the management of the firm affairs. The prohibition is variously expressed. In most states the statutes provide that the general partners, only, shall be authorized to transact business for the partnerships.[228] Some statutes say that

[225] Bates, Partn. § 99; Taylor v. Rasch, 1 Flip. 385, Fed. Cas. No. 13,800.

[226] Singer v. Kelly, 44 Pa. St. 145; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Perth Amboy Manuf'g Co. v. Condit, 21 N. J. Law, 659.

[227] First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 34. And see post, p. 474.

[228] ALABAMA: Code 1886, § 1707. ARKANSAS: Sand. & H. Dig. 1894, § 5464. CALIFORNIA: Civ. Code 1886, § 2489. COLORADO: Mills' Ann. St. 1891, § 3371. DAKOTA: Comp. Laws 1887, § 4082. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 20. FLORIDA: McClel. Dig. 1881, c. 159, § 13. GEORGIA: Code 1882, § 1922. IDAHO: Rev. St. 1887, § 3279. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 3. INDIANA: Rev. St. 1894, § 8115. IOWA: McClain's Code 1888, § 3332. KANSAS: Gen. St. 1889, par. 3992. KENTUCKY: St. 1894, c. 94, § 3768. MAINE: Rev. St. 1883, c.

the special partner shall not be authorized to sign for the partnership, or to bind it.[229] In many states the statutes provide that the special partner cannot be employed to transact firm business as attorney, agent, or otherwise.[230] Under most statutes a special partner interfering contrary to their provisions is deemed a general part-

33, § 6. MARYLAND: Code 1888, art. 73, § 12. MICHIGAN: How. Ann. St. 1882, § 2343. MINNESOTA: Gen. St. 1894, § 2332. MISSISSIPPI: Code 1892, § 2771. MISSOURI: Rev. St. 1889, § 7201. NEBRASKA: Comp. St. 1893, c. 65, § 3. NEVADA: Gen. St. 1885, § 4911. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 6. NEW JERSEY: Gen. St. 1895, "Partnership," § 3. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 3. NORTH CAROLINA: Code 1883, § 3104. NORTH DAKOTA: Rev. Code 1895, § 4426. OHIO: Rev. St. 1892, § 3153. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 4. RHODE ISLAND: Gen. St. Laws 1896, c. 157, § 8. SOUTH CAROLINA: Rev. St. 1893, § 1409. TENNESSEE: Mill. & V. Code 1884, § 2400. TEXAS: Rev. St. 1895, art. 3585. UTAH: Comp. Laws 1888, § 2475. VIRGINIA: Code 1887, § 2871. WEST VIRGINIA: Code 1891, c. 100, § 7. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1716. WYOMING: Rev. St. 1887, § 4078.

[229] ALABAMA: Code 1886, § 1707. ARKANSAS: Sand. & H. Dig. 1894, § 5449. COLORADO: Mills' Ann. St. 1891, § 3371. GEORGIA: Code 1882, § 1922. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 3. IOWA: McClain's Code 1888, § 3332. KANSAS: Gen. St. 1889, pars. 3979, 3992. KENTUCKY: St. 1894, c. 94, § 3773. MICHIGAN: How. Ann. St. 1882, § 2343. MINNESOTA: Gen. St. 1894, § 2332. MISSISSIPPI: Code 1892, § 2771. NEBRASKA: Comp. St. 1893, c. 65, § 3. NEW JERSEY: Gen. St. 1895, "Partnership," §§ 3, 25. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 3. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 23. SOUTH CAROLINA: Rev. St. 1893, § 1409. TENNESSEE: Mill. & V. Code 1884, § 2400. TEXAS: Rev. St. 1895, art. 3585. UTAH: Comp. Laws 1888, § 2475. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1716. See Columbia Land & Cattle Co. v. Daly, 46 Kan. 504, 26 Pac. 1042.

[230] ALABAMA: Code 1886, § 1722. ARKANSAS: Sand. & H. Dig. 1894, § 5464. GEORGIA: Code 1882, § 1936. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 19. IOWA: McClain's Code 1888, § 3346. KANSAS: Gen. St. 1889, par. 3992. KENTUCKY: St. 1894, c. 94, § 3773. MINNESOTA: Gen. St. 1894, § 2345. MISSISSIPPI: Code 1892, § 2773. MISSOURI: Rev. St. 1889, § 7201. NEBRASKA: Comp. St. 1893, c. 65, § 17. NEW JERSEY: Gen. St. 1895, "Partnership," § 17. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 17. NORTH CAROLINA: Code 1883, § 3104. OHIO: Rev. St. 1892, § 3153. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," 23. SOUTH CAROLINA: Rev. St. 1893, § 1421. TENNESSEE: Mill. & V. Code 1884, § 2415. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1716.

ner.[231] In several states it is provided that, if a special partner make any contract respecting partnership concerns with any persons except general partners, he shall be deemed a general partner,[232]

[231] ALABAMA: Code 1886, § 1722. ARKANSAS: Sand. & H. Dig. 1894, § 5464. COLORADO: Mills' Ann. St. 1891, § 3378. DAKOTA: Comp. Laws 1887, § 4092. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 20. FLORIDA: McClel. Dig. 1881, c. 169, § 13. GEORGIA: Code 1882, § 1936. IDAHO: Rev. St. 1887, § 3289. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 19. INDIANA: Rev. St. 1894, § 8115. IOWA: McClain's Code 1888, § 3346. KANSAS: Gen. St. 1889, par. 3992. KENTUCKY: St. 1894, c. 94, § 3773. MARYLAND: Rev. Code 1888, art. 73, § 12. MINNESOTA: Gen. St. 1894, § 2345. MISSISSIPPI: Code 1892, § 2773. MISSOURI: Rev. St. 1889, § 7201. NEBRASKA: Comp. St. 1893, c. 65, § 17. NEVADA: Gen. St. 1885, § 4911. NEW JERSEY: Gen. St. 1895, "Partnership," § 25. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 17. NORTH CAROLINA: Code 1883, § 3104. NORTH DAKOTA: Rev. Code 1895, § 4436. OHIO: Rev. St. 1892, § 3153. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 23. SOUTH CAROLINA: Rev. St. 1893, § 1421. TENNESSEE: Mill. & V. Code 1884, § 2415. TEXAS: Rev. St. 1895, art. 3595. UTAH: Comp. Laws 1888, § 2491. VIRGINIA: Code 1887, § 2871. WEST VIRGINIA: Code 1891, c. 100, § 7. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1716. WYOMING: Rev. St. 1887, § 4088. As to what acts amount to interference, see Davis v. Bowes, 15 U. C. Q. B. 280; Madison County Bank v. Gould, 5 Hill (N. Y.) 309. The statute does not prevent a limited partner, if he is willing to assume the liabilities that follow from acting as general partner, unless, by the articles of co-partnership, he is excluded from a control as a general partner; and this restriction may cease at the expiration of the partnership. Hogg v. Ellis, 8 How. Prac. (N. Y.) 473. A special partner in a firm, who is a party to a transfer of all the assets of his firm to one creditor for the benefit of the creditors of the firm, becomes liable to such creditors as a general partner. Farnsworth v. Boardman, 131 Mass. 115. If, during the existence of a limited partnership, the special partner buys out the entire firm property, and continues the business in his own name, for his own account, he interferes with the firm business, contrary to the provisions of section 17 of the act relating to limited partnerships (1 Rev. St. p. 766), and renders himself liable as a general partner. First Nat. Bank of Canandaigua v. Whitney, 4 Lans. (N. Y.) 34. An action brought by a special partner against his general partners in the interest of the firm creditors, and for the preservation of the partnership trust funds, in which the special partner is appointed receiver, is not such an interference with the business as will make him liable as a general partner. 17 N. Y. Supp. 188, affirmed Continental Nat. Bank of Boston v. Strauss, 137 N. Y. 148, 553, 32 N. E. 1066.

[232] DELAWARE: Rev. Code 1874, c. 64, § 4. INDIANA: Rev. St. 1894, § 8115. MICHIGAN: How. Ann. St. 1882, § 2354. MONTANA: Civ. Code

but in other states it is provided that he shall be deemed a general partner only as to such contract.[233] In Vermont [234] he is not so liable if he notify the other party that he is acting only as a special partner; nor in Oregon [235] and Washington,[236] if he acted and was recognized as such. A few statutes provide that a special partner who has unintentionally done any act contrary to the provisions of the statute shall be liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice.[237]

The following exceptions to the rule prohibiting any interference in the partnership affairs by the special partner are each created by the statutes of one or more states: He may in most states, from time to time, examine the concern and advise as to its management,[238] though no consequence follows the neglect of his advice,

1895, § 3343. NEVADA: Gen. St. 1885, § 4911. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 6. RHODE ISLAND: Gen. Laws 1896, c. 157, § 8. VIRGINIA: Code 1887, § 2871. WEST VIRGINIA: Code 1891, c. 100, § 7. See Bowes v. Holland, 14 U. C. Q. B. 316.

[233] MAINE: Rev. St. 1883, c. 33, § 6. OREGON: 2 Hill's Ann. Laws 1892, § 3853. VERMONT: St. 1894, § 4282. WASHINGTON: Gen. St. 1891, § 2922.

[234] St. 1894, § 4282.

[235] 2 Hill's Ann. Laws 1892, § 3853.

[236] Gen. St. 1891, § 2922.

[237] CALIFORNIA: Civ. Code 1886, § 2502. DAKOTA: Comp. Laws 1887, § 4092. IDAHO: Rev. St. 1887, § 3289. NORTH DAKOTA: Rev. Code 1895, § 4436. WYOMING: Rev. St. 1887, § 4088.

[238] ALABAMA: Code 1886, § 1722. ARKANSAS: Sand. & H. Dig. 1894, § 5464. CALIFORNIA: Civ. Code 1886, § 2490. DAKOTA: Comp. Laws 1887, § 4083. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 20. FLORIDA: McClel. Dig. 1881, c. 159, § 13. GEORGIA: Code 1882, § 1936. IDAHO: Rev. St. 1887, § 3280. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 19. IOWA: McClain's Code 1888, § 3346. KANSAS: Gen. St. 1889, par. 3992. KENTUCKY: St. 1894, c. 94, § 3773. MARYLAND: Code 1888, art. 73, § 12. MICHIGAN: How. Ann. St. 1882, § 2364. MINNESOTA: Gen. St. 1894, § 2345. MISSISSIPPI: Code 1892, § 2773. MISSOURI: Rev. St. 1889, § 7201. NEBRASKA: Comp. St. 1893, c. 65, § 17. NEW JERSEY: Gen. St. 1895, "Partnership," § 17. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 17. NORTH CAROLINA: Code 1883, § 3104. NORTH DAKOTA: Rev. Code 1895, § 4427. OHIO: Rev. St. 1892, § 3153. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 23. SOUTH CAROLINA: Rev. St. 1893, § 1421. TENNESSEE: Mill. & V. Code 1884, § 2415. TEXAS: Rev. St. 1895, art. 3599. UTAH: Comp. Laws 1888, § 2489. VIR-

and he has no power to vote.[239] He may sometimes act as an attorney at law.[240] He may be constituted agent by the general partners for negotiating sales, purchases, and transacting other business, upon disclosing his agency to the other party.[241] In several states he may act as attorney in fact under a power.[242] In Illinois [243] and Tennessee [244] it seems he may transact any business with the express assent of all the general partners. In a number of states he may loan or advance money to the partnership, pay money for it, take and hold the notes, drafts, bonds, and acceptances of it as security therefor, use and lend his name and credit as security for the partnership in any business thereof, and have the same rights and remedies in this respect as any other creditor would have.[245] He may lease lands, etc., to the general partners for part-

GINIA: Code 1887, § 2871. WEST VIRGINIA: Code 1891, c. 100, § 7. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1716. WYOMING: Rev. St. 1887, § 4079. Cf. Ulman v. Briggs, 32 La. Ann. 655, 657, per Bermudez, C. J.

239 Bates, Lim. Partn. § 111.

240 ALABAMA: Code 1886, § 1722. GEORGIA: Code 1882, § 1936. MISSISSIPPI: Code 1892, § 2773. NORTH CAROLINA: Code 1883, § 3104. SOUTH CAROLINA: Rev. St. 1893, § 1421.

241 OHIO: Rev. St. 1892, § 3153.

242 FLORIDA: McClel. Dig. 1881, c. 159, § 13. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 19. TENNESSEE: Mill. & V. Code 1884, § 2415.

243 2 Starr & C. Ann. St. 1896, c. 84, § 19.

244 Mill. & V. Code 1884, § 2415.

245 CALIFORNIA: Civ. Code 1886, § 2491. DAKOTA: Comp. Laws 1887, § 4084. IDAHO: Rev. St. 1887, § 3281. MICHIGAN: How. Ann. St. 1882, § 2364. MINNESOTA: Gen. St. 1894, § 2345. NEW JERSEY: Gen. St. 1895, "Partnership," § 25. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 17. NORTH DAKOTA: Rev. Code 1895, § 4428. WYOMING: Rev. St. 1887, § 4080. But in case of the insolvency of a partnership no special partner shall be allowed to claim as a creditor until the claims of all others are satisfied. ALABAMA: Code 1886, § 1728. ARKANSAS: Sand. & H. Dig. 1894, § 5470. CALIFORNIA: Civ. Code 1886, § 2491. DAKOTA: Comp. Laws 1887, § 4084. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 25. FLORIDA: McClel. Dig. 1881, c. 159, § 18. GEORGIA: Code 1882, § 1942. IDAHO: Rev. St. 1887, § 3281. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 23. IOWA: McClain's Code 1888, § 3352. KENTUCKY: St. 1894, c. 94, § 3775. MARYLAND: Code 1888, art. 73, § 18. MINNESOTA: Gen. St. 1894, § 2349. MISSISSIPPI: Code 1892, § 2781. MISSOURI: Rev. St. 1889, § 7203. NEBRASKA: Comp. St. 1893, c. 65, § 23. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 12. NEW JERSEY: Gen. St. 1895, "Partnership," § 23. NEW

nership purposes.[246] He may negotiate sales, purchases, and other business for the partnership, but such shall not be binding upon it until approved by a general partner.[247]

SAME—INSOLVENCY.

215. The rights of the parties in case of insolvency of the firm will be considered under the following heads:

(a) **Fraudulent conveyances** (p. 478).

(b) **Property a trust fund for creditors** (p. 480).

(c) **Assignments for benefit of creditors** (p. 483).

(d) **The special partner as a creditor** (p. 484).

216. A limited partnership is insolvent when it has not sufficient property and effects to pay all its debts.

The term "insolvency," as used in the limited partnership acts, was defined as above in the case of McArthur v. Chase.[248] The court said: "To declare that open and notorious bankruptcy is the true and only test of insolvency would, as was argued by the counsel for the appellees, defeat in most cases the design of the law, inasmuch as the desire of a firm in failing circumstances to sustain itself, as also to prefer its special friends, would generally result in sales and assignments of most of its property, made to insure those ends, before such bankruptcy would occur. To say, on the other hand, that the firm should be held to be insolvent whenever, from any cause, it may fail to meet its engagements in the usual course of

YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 23. NORTH CAROLINA: Code 1883, § 3107. NORTH DAKOTA: Rev. Code, 1895, § 4428. OHIO: Rev. St. 1892, § 3158. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 29. RHODE ISLAND: Gen. Laws 1896, c. 157, § 11. SOUTH CAROLINA: Rev. St. 1893, § 1427. TENNESSEE: Mill. & V. Code 1884, § 2420. TEXAS: Rev. St. 1895, art. 3604. UTAH: Comp. Laws 1888, § 2492. VIRGINIA: Code 1887, § 2873. WEST VIRGINIA: Code 1891, c. 100, § 9. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1722. WYOMING: Rev. St. 1887, § 4080. And see CONNECTICUT: Gen. St. 1888, § 3283.

[246] NEW YORK: Laws 1872, c. 114.

[247] MINNESOTA: Gen. St. 1894, § 2345. NEW JERSEY: Gen. St. 1895, "Partnership," § 25. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 17.

[248] 13 Grat. (Va.) 683. And see Levy v. Ley, 6 Abb. Prac. (N. Y.) 89.

business, would seem to be harsh, and might tend greatly to discourage the formation of such partnerships. In a country like ours, where so much of its commercial business and trading enterprises are based on borrowed capital, and where sudden and unexpected expansions and contractions of the currency are matters of frequent occurrence, it may often happen that the most prudent firm, by the unexpected failure of some of its debtors to meet their payments, or other like causes, may find itself unprovided with available means to meet its own bills and notes as they mature, though possessed of assets amply sufficient to satisfy, ultimately, all its debts and liabilities. A law declaring it incompetent in a partnership so situated to discharge its more pressing engagements by sales or assignments of portions of its property and credits to certain creditors, to pay or secure their demands, might, and most probably would, often occasion the stoppage and winding up of such concerns at times when the safety of the creditors would demand no such sacrifice." So, in Walkenshaw v. Perzel,[249] it was said: "It is true that insolvency and inability to pay are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere, on demand, nor does it require that a person shall have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency." In Herrick v. Borst,[250] the term "solvent" was said to mean one who has his property in such a situation that all his debts may be collected out of it by legal process.

217. FRAUDULENT CONVEYANCES — The statutes of most states prohibit the transfer of property of the firm, or of the general or special partners, in contemplation of insolvency of such firm or partner, with intent to create a preference over other creditors of the firm.

218. If a special partner concurs in a violation of the above prohibition, he is liable as a general partner.

The statutes of most states contain provisions intended to secure equality between the creditors of the firm in case of insolvency.

[249] 32 How. Prac. (N. Y.) 233, 240. [250] 4 Hill (N. Y.) 650.

These provisions are substantially as follows: Every sale, assignment, or transfer of any of the property or effects of such limited partnership, made by it when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or of such insolvent partner over other creditors of such partnership, and every judgment confessed, lien given, or security given by such partnership under like circumstances and with like intent, is void as against the creditors of such partnership.[251] So, every sale, etc., of the property, etc., of a general or special (except in Florida[252] and District of Columbia[253]) partner in like circumstances, made with intent of giving any creditor of his own or of the partnership such preference, or any judgment confessed, lien created, or security so given, is void as above.[254] Any

[251] ALABAMA: Code 1886, § 1725. ARKANSAS: Sand. & H. Dig. 1894, § 5467. CALIFORNIA: Civ. Code 1886, § 2496. DAKOTA: Comp. Laws 1887, § 4089. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 23. FLORIDA: McClel. Dig. 1881, c. 159, § 16. GEORGIA: Code 1882, § 1939. IDAHO: Rev. St. 1887, § 3286. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 22. IOWA: McClain's Code 1888, § 3349. KENTUCKY: St. 1894, c. 94, § 3776. MARYLAND: Code 1888, art. 73, § 15. MINNESOTA: Gen. St. 1894, § 2346. MISSOURI: Rev. St. 1889, § 7204. NEBRASKA: Comp. St. 1893, c. 65, § 20. NEW JERSEY: Gen. St. 1895, "Partnership," § 20. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 20. NORTH DAKOTA: Rev. Code 1895, § 4433. OHIO: Rev. St. 1892, § 3156. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," 26. SOUTH CAROLINA: Rev. St. 1893, § 1424. TENNESSEE: Mill. & V. Code 1884, § 2418. TEXAS: Rev. St. 1895, art. 3601. VIRGINIA: Code 1887, § 2874. WEST VIRGINIA: Code 1891, c. 100, § 10. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1719. WYOMING: Rev. St. 1887, § 4085.

[252] McClel. Dig. 1881, c. 159, § 16.

[253] Comp. St. 1894, c. 43, § 23.

[254] ALABAMA: Code 1886, § 1726. ARKANSAS: Sand. & H. Dig. 1894, § 5468. CALIFORNIA: Civ. Code 1886, § 2496. DAKOTA: Comp. Laws 1887, § 4089. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 23. FLORIDA: McClel. Dig. 1881, c. 159, § 16. GEORGIA: Code 1882, § 1940. IDAHO: Rev. St. 1887, § 3286. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 22. IOWA: Code 1888, § 3350. KENTUCKY: St. 1894, c. 94, § 3776. MARYLAND: Code 1888, art. 73, § 16. MINNESOTA: Gen. St. 1894, § 2347. MISSOURI: Rev. St. 1889, § 7204. NEBRASKA: Comp. St. 1893, c. 65, § 21. NEW JERSEY: Gen. St. 1895, "Partnership," § 21. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 20. NORTH DAKOTA: Rev. Code 1895, §

special partner violating the above provisions, or concurring in any such violation by the partnership or an individual partner, is, in most states, liable as a general partner.[255]

219. PROPERTY A TRUST FUND FOR CREDITORS—Where a limited partnership becomes insolvent, the property and effects of the firm are a special trust fund for the payment of all the partnership debts pro rata, except debts due to the special partner.

The statutory provisions intended to secure equality in the distribution of the partnership property among the partnership creditors in case of insolvency in effect create such property a trust fund for creditors. In Innes v. Lansing[256] the court said: "It is evident, from these statutory provisions, that the legislature could not have intended that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, the necessary effect of which might be to give him a preference over other creditors, before he could be permitted to file a bill in this court, to prevent the partnership funds from being wasted by the insolvent partners, and to obtain payment of a ratable portion of his debt out of the fund. Although any creditor, therefore, may proceed at law for the recovery of his debt, unless a decree has been

4433. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 27. SOUTH CAROLINA: Rev. St. 1893, § 1425. TENNESSEE: Mill. & V. Code 1884, § 2418. TEXAS: Rev. St. 1895, art. 3602. VIRGINIA: Code 1887, § 2874. WEST VIRGINIA: Code 1891, c. 100, § 10. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1720. WYOMING: Rev. St. 1887, § 4085.

[255] ALABAMA: Code 1886, § 1727. ARKANSAS: Sand. & H. Dig. 1894, § 5469. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 24. FLORIDA: McClel. Dig. 1881, c. 159, § 17. GEORGIA: Code 1882, § 1941. IOWA: McClain's Code 1888, § 3351. MARYLAND: Code 1888, art. 73, § 17. MINNESOTA: Gen. St. 1894, § 2348. NEBRASKA: Comp. St. 1893, c. 65, § 22. NEW JERSEY: Gen. St. 1895, "Partnership," § 22. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 22. OHIO: Rev. St. 1892, § 3157. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 28. SOUTH CAROLINA: Rev. St. 1893, § 1426. TENNESSEE: Mill. & V. Code 1884, § 2419. TEXAS: Rev. St. 1895, art. 3603. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1721. WYOMING: Rev. St. 1887, § 4087, subd. 3.

[256] 7 Paige (N. Y.) 583.

obtained in this court for the benefit of all the creditors equally, or the property has been transferred to a trustee or receiver for the purpose of having such a ratable distribution thereof, I think this court is bound to carry into effect the principle of the statute, by treating the property of the limited partnership, after insolvency, as a trust fund for the benefit of all the creditors. * * * I regret that I am obliged to extend the jurisdiction of this court to this new class of cases. But whenever the legislature creates new rights in parties, for the protection and enforcement of which rights the common law affords no effectual remedy, and the statute itself does not prescribe the mode in which such rights are to be protected, this court, in the exercise of its acknowledged jurisdiction, is bound to give to a party the relief to which he is equitably entitled under the statute." This case was quoted with approval in a Missouri case,[257] where, in an able opinion, Bakewell, J., said: "Whether the statute does or does not impress a trust upon the assets of a limited partnership from the moment of its insolvency, it certainly does seem to render the assets trust funds in a sense in which those of an ordinary partnership are not a trust fund, and to contemplate a remedy for the creditor which, in the case of an ordinary partnership, he cannot have. The pro rata distribution of the assets cannot be effected without the aid of a court of chancery. It is the ordinary jurisdiction of a court of equity to dissolve a partnership and distribute its assets on the application of one of the partners. From the moment of such an application, the funds became trust funds. They were not so in the hands of the partners. The funds of a limited partnership may not be trust funds in the hands of the partners, or at the moment of insolvency, but they become so when the aid of equity is effectually invoked; and we think that the manifest intention of the legislature, in the sections quoted above, was to give to the creditor an effectual remedy. If he must apply first to a court of law, and obtain a judgment, the provisions of the statute are nugatory. He has then no protection in the case of a limited partnership which he has not in the case of a general partnership." In both these cases it was held that a general creditor, i. e. one who has not acquired a lien as by

257 Batchelder v. Altheimer, 10 Mo. App. 181.

judgment and execution, could maintain a bill to enforce the trust. It is not necessary that any improper conduct on the part of the partners be shown. The creditor filing the bill must sue on behalf of himself and all other creditors.[258] The trust may be enforced by any partner.[259]

When Trust Begins.

There is a discrepancy in the cases as to the period at which the funds of a limited partnership become trust funds in the sense under consideration; the earlier cases holding that from the moment of insolvency they become trust funds, to be distributed equally,[260] and the later cases deciding that a preference may be obtained by hostile proceedings against the firm after insolvency,[261] but not after a creditor has filed his bill for equitable relief, or at least not after the appointment of a receiver.[262] The appointment of a receiver is a sequestration, by act of law, of the property, which vests in him by relation from the date of the order.[263]

258 Whitcomb v. Fowle, 7 Abb. N. C. (N. Y.) 295; Van Alstyne v. Cook, 25 N. Y. 489; La Chaise v. Lord, 1 Abb. Prac. (N. Y.) 213.

259 Snyder v. Leland, 127 Mass. 291; Bell v. Merrifield, 28 Hun (N. Y.) 219.

260 Jackson v. Sheldon, 9 Abb. Prac. (N. Y.) 127; Innes v. Lansing, 7 Paige (N. Y.) 583; Whitewright v. Stimpson, 2 Barb. (N. Y.) 379.

261 Van Alstyne v. Cook, 25 N. Y. 489; Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Greene v. Breck, 32 Barb. (N. Y.) 73. But see Jackson v. Sheldon, 9 Abb. Prac. (N. Y.) 127. Any creditor of an insolvent limited partnership, although he has not proceeded to judgment and execution at law, may bring an action to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. Whitcomb v. Fowle, 7 Abb. N. C. (N. Y.) 295. The fact that persons holding judgments by confession against a limited partnership sought to secure a preference contrary to the statute, and failed, will not postpone them to other creditors. Green v. Hood, 42 Ill. App. 652.

262 Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Van Alstyne v. Cook, 25 N. Y. 489; Whitcomb v. Fowle, 56 How. Prac. (N. Y.) 365; Whitewright v. Stimpson, 2 Barb. (N. Y.) 379.

263 Batchelder v. Altheimer, 10 Mo. App. 181.

220. ASSIGNMENTS FOR BENEFIT OF CREDITORS—By the weight of authority, assignments for the benefit of creditors cannot be made without the assent of all the partners, general and special.

It has been seen that in ordinary partnerships, by the weight of authority, one partner has no power to make an assignment of the firm property for the benefit of creditors.[264] It seems that the same rule is applicable to limited partnerships, and the assent of the special partner is necessary to the validity of such assignment. But the few cases on the subject are not unanimous.[265] It seems that the rights and powers of an assignee of a limited partnership are the same as the rights and powers of the assignee of a general partnership, unless the limited partnership was insolvent or contemplating insolvency.[266]

Statutory Provisions.

No general assignment by a limited partnership in case of insolvency is, in several states, valid unless it provide for a distribution of the partnership property among all the creditors in proportion to the amount of their several legal claims,[267] except that

264 Ante, p. 217.

265 Bowen v. Argall, 24 Wend. (N. Y.) 496; Mills v. Argall, 6 Paige (N. Y.) 577; Hayes v. Heyer, 3 Sandf. (N. Y.) 284; Darrow v. Bruff, 36 How. Prac. (N. Y.) 479; Kerr v. Blodgett, 48 N. Y. 62.

266 Lancaster v. Choate, 5 Allen (Mass.) 530; Bullitt v. Chartered Fund, 26 Pa. St. 108; Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Merrill v. Wilson, 29 Me. 58.

267 DELAWARE: Rev. Code 1874, c. 64, § 6. IDAHO: Rev. St. 1887, § 3286. INDIANA: Rev. St. 1894, § 8117. MICHIGAN: How. Ann. St. 1882, § 2356. MISSISSIPPI: Code 1880, § 1025. MONTANA: Civ. Code 1895, § 3317. NEVADA: Gen. St. 1885, § 4913. RHODE ISLAND: Gen. Laws 1896, c. 157, § 10. Cf. Corbin v. Boies, 34 Fed. 692; Green v. Hood, 42 Ill. App. 652. As to a preference of individual creditors out of the special partner's individual property, see George v. Grant, 97 N. Y. 262. Code 1887, § 2874, providing that no sale of the property of a limited partnership, or of any interest therein, shall be valid if made by the partnership, or by any partner, at a time when he or it has not sufficient property to pay debts, for the purpose of preferring creditors, etc., does not affect a bona fide purchaser, living in a distant state, who takes property standing in the name of the partner, without knowledge of any partnership, or that the assets of a partnership have been employed in buying or improving it. State Bank of Virginia v. Blanchard, 90 Va. 22, 17 S. E. 742.

the claims of the United States, arising from bonds or duties, are first to be paid or secured.[268] The assent of creditors to such assignment is presumed unless, within 60 days after notice thereof, they dissent expressly, or by some act clearly implying such dissent.[269] No such assignment is valid unless notice thereof be given in some newspaper published in the county where is the principal place of business, within 14 days thereafter.[270]

221. SPECIAL PARTNER AS A CREDITOR—The statutes generally provide that, in case of insolvency of the firm, no special partner shall be allowed to claim as a creditor until the claims of all others are satisfied.[271]

222. In the absence of such statutes, except as to capital, the special partner stands on a par with other creditors.

Meaning of "Insolvency."

It seems that the term "insolvency" is used in this connection in a different sense from that before considered. There it meant lack

[268] MICHIGAN: How. Ann. St. 1882, § 2356. RHODE ISLAND: Gen. Laws 1896, c. 157, § 10.

[269] INDIANA: Rev. St. 1894, § 8118. MICHIGAN: How. Ann. St. 1882, § 2357. MONTANA: Comp. St. 1887, § 1605. NEVADA: Gen. St. 1885, § 4914.

[270] INDIANA: Rev. St. 1894, § 8118. MICHIGAN: How. Ann. St. 1882, § 2357. MONTANA: Comp. St. 1887, § 1605 (20 days). NEVADA: Gen. St. 1885, § 4914.

[271] ALABAMA: Code 1886, § 1728. ARKANSAS: Sand. & H. Dig. 1894, § 5470. CALIFORNIA: Civ. Code 1886, § 2491. DAKOTA: Comp. Laws 1887, § 4084. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 25. FLORIDA: McClel. Dig. 1881, c. 159, § 18. GEORGIA: Code 1882, § 1942. IDAHO: Rev. St. 1887, § 3281. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 23. IOWA: McClain's Code 1888, § 3352. KENTUCKY: St. 1894, c. 94, § 3775. MARYLAND: Code 1888, art. 73, § 18. MINNESOTA: Gen. St. 1894, § 2349. MISSISSIPPI: Code 1892, § 2781. MISSOURI: Rev. St. 1889, § 7203. NEBRASKA: Comp. St. 1893, c. 65, § 23. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 12. NEW JERSEY: Gen. St. 1895, "Partnership," § 23. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 23. NORTH CAROLINA: Code 1883, § 3107. NORTH DAKOTA: Rev. Code 1895, § 4428. OHIO: Rev. St. 1892, §

of assets sufficient to pay all debt.[272] Here it seems to mean a declared insolvency and a judicial winding up of the firm. This view is supported by the very great authority of Mr. Bates,[273] and by the fact that the statutes provide no penalty for a violation. The only consequence of an attempted violation is that the provision for the special partner is void.[274] Merely naming a special partner as a creditor in a general assignment for the benefit of creditors does not amount to an interference, nor render him liable as a general partner.[275] It is, of course, possible that the provision for the special partner may be void under the section relating to conveyances in contemplation of insolvency, in which case, as has been seen, the penalty for a violation is liability as a general partner.[276]

Application of Statute.

Prior to insolvency, the special partner stands upon the footing of any other creditor, and may deal with the firm as such.[277] The prohibition applies both to the special partner's claim for capital

3158. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 29. RHODE ISLAND: Gen. Laws 1896, c. 157, § 11. SOUTH CAROLINA: Rev. St. 1893, § 1427. TENNESSEE: Mill. & V. Code 1884, § 2420. TEXAS: Rev. St. 1895, art. 3604. UTAH: Comp. Laws 1888, § 2492. VIRGINIA: Code 1887, § 2873. WEST VIRGINIA: Code 1891, c. 100, § 9. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1722. WYOMING: Rev. St. 1887, § 4080. And see CONNECTICUT: Gen. St. 1888, § 3283. Dunning's Appeal, 44 Pa. St. 150.

272 Ante, p. 480. Proceedings in insolvency against J. S. on his petition do not necessarily include a limited partnership doing business under his name, and in which he is the general partner, but which is not mentioned in the petition, notice, or assignment. Nutting v. Ashcroft, 101 Mass. 300.

273 Lim. Partn. § 181. And see Ward v. Newell, 42 Barb. (N. Y.) 482; Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664.

274 Bowen v. Argall, 24 Wend. (N. Y.) 496; Durant v. Abendroth, 97 N. Y. 132; Mattison v. Demarest, 4 Rob. (N. Y.) 161; Mills v. Argall, 6 Paige (N. Y.) 577. On the dissolution of a limited partnership, the business was continued by the general partners, who took the assets of the old firm. Afterwards the new firm became insolvent, and they paid the partner who had retired the amount of capital which he had contributed. It appeared that the special partnership was insolvent when it dissolved. Held, that such payment was fraudulent as to creditors both of the old and the new firm. Van Brunt, P. J., dissenting, on the ground that the transfer was fraudulent only as to creditors of the special partnership. Baily v. Hornthal, 89 Hun, 514, 35 N. Y. Supp. 437.

275 Bowen v. Argall, 24 Wend. (N. Y.) 496.

276 Ante, p. 478.

277 See ante, p. 472.

contributed, and to an indebtedness arising out of loans, advancements, money paid for the firm, and the like. His claims in either case are postponed to those of other creditors. As to the claim for capital, this would be true, even in the absence of the provision under discussion;[278] and it seems clear, therefore, that the provision applies to any and all other debts due the special partner, for otherwise it would be entirely useless and of no effect. This is the construction put upon the statute by the weight of authority.[279] In Connecticut this provision has been held to mean that a special partner shall not be allowed to claim as a creditor any portion of the fund put in by him as capital, and not that he should be deprived of the rights of a creditor as to debts owed him by the partnership.[280] In New York, in 1857,[281] the statute was amended so as to permit the special partner to come in on a par with other creditors, the New York decisions having previously taken the other view.[282] The statute only applies to claims due the special partner personally. It does not apply to claims due another firm of which the special partner is also a member,[283] nor to claims of a corporation, in which the special partner is a stockholder.[284] It does not apply to claims arising after a dissolution,[285] nor, of course, to individual transactions between the general and special partner, having nothing to do with the partnership affairs.[286] The provi-

278 White v. Hackett, 20 N. Y. 178.

279 White v. Hackett, 20 N. Y. 178; Van Alstyne v. Cook, 25 N. Y. 489; Singer v. Kelly, 44 Pa. St. 145; Hall v. Glessner, 100 Mo. 155, 13 S. W. 349; Jaffe v. Krum, 88 Mo. 669.

280 Clapp v. Lacey, 35 Conn. 463.

281 Laws 1857, c. 414.

282 Mills v. Argall, 6 Paige (N. Y.) 577; Hayes v. Bement, 3 Sandf. (N. Y.) 394; Hayes v. Heyer, 35 N. Y. 326. Cf. White v. Hackett, 20 N. Y. 178.

283 Hayes v. Bement, 3 Sandf. (N. Y.) 394.

284 Hayes v. Heyer, 35 N. Y. 326.

285 Hayes v. Heyer, 35 N. Y. 326; Durant v. Abendroth, 97 N. Y. 132.

286 Battaille v. Battaille, 6 La. Ann. 682. In insolvency proceedings to wind up the business of an insolvent commercial partnership, a partner in commendam, who claims to be a creditor of his co-partner, does not occupy a better position than a full or active partner; and hence he cannot be allowed, as against creditors to enforce a pledge, granted to him by his co-partner, on the latter's share of the partnership property. Sherwood v. His Creditors, 42 La. Ann. 103, 7 South. 79.

sion is for the benefit of creditors, and cannot be invoked as a defense by the general partners.[287]

TERMINATION OF RELATION—DISSOLUTION.

223. The term "dissolution," as applied to limited partnerships, is used ambiguously to mean either

(a) The termination of all future liability (p. 487), **or**

(b) The change from limited to general liability (p. 493).

SAME—TERMINATION OF FUTURE LIABILITY.

224. A limited partnership may be dissolved, and all future liability of all partners terminated, either

(a) By operation of law (p. 487), **or**

(b) By act of the parties (p. 491).

225. BY OPERATION OF LAW—A limited partnership is dissolved by operation of law, in the sense of the termination of all future liability of all the partners, in the following cases:

(a) By limitation (p. 487).

(b) By bankruptcy of the firm or any member of it (p. 488).

(c) By abandonment (p. 488).

(d) By death (p. 488).

(e) By judicial decree (p. 489).

(f) By conveyance of one partner's interest (p. 489).

226. No notice of dissolution by operation of law is necessary except in the case of the conveyance of one partner's interest.

Termination by Limitation.

Upon the expiration of the term designated in the certificate for its continuance, a limited partnership terminates absolutely by operation of law, and without notice. The partners no longer have the power to bind each other.[288] The certificate recorded and pub-

287 Brooke v. Alexander, 3 Wkly. Notes Cas. 304.

288 Haggerty v. Taylor, 10 Paige (N. Y.) 261; Marshall v. Lambeth, 7 Rob.

lished at the time the partnership was formed must specify when the partnership is to terminate, and is sufficient notice to the public. In the case of a general partnership, notice of dissolution upon expiration of the term limited is necessary, because in such case the public is not presumed to have any knowledge of the stipulations in the partnership articles.[289]

Bankruptcy and Insolvency.

Bankruptcy or an assignment for the benefit of creditors of either the firm or a general or special partner works a dissolution of the partnership by operation of law and without notice.[290] In Pennsylvania, by statute, the insolvency of a special partner does not cause a dissolution of the partnership, but his interest may be sold by his assignee.[291]

Abandonment.

In Outcalt v. Burnet [292] it was held that, under the section providing that an alteration shall be deemed a dissolution, the abandonment of the business by the general partners worked a dissolution. No notice is necessary.

Death.

In the absence of any contract or statutory provision to the contrary,[293] a limited partnership is dissolved by the death of either a general or a special partner.[294] In some states this is specifically provided by statute.[295] In a few states, however, it is provided by statute that death shall not cause a dissolution unless the articles

(La.) 471. When the limited partnership was not properly formed, notice of the expiration must be given to terminate liability. Haviland v. Chace, 39 Barb. (N. Y.) 283.

289 See ante, p. 407.

290 Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664. The dissolution of a limited partnership by insolvency prior to the expiration of its term will not render the special partner liable as a general partner. Continental Nat. Bank of Boston v. Strauss (Super. N. Y.) 17 N. Y. Supp. 188.

291 Pepper & L. Dig. 1894, "Limited Partnership," § 32.

292 1 Handy (Ohio) 404; In re Terry, 5 Biss. 110, Fed. Cas. No. 13,836.

293 ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 13.

294 Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321.

295 DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 30. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 13. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12.

so provide.[296] In all states it is probably competent for the parties to agree that death shall not work a dissolution, and the statutes of some states expressly authorize such contracts.[297] Notice of dissolution by death is unnecessary.[298]

Judicial Decree.

A limited partnership may be dissolved by judicial decree at the instance of either a general or special partner, upon the same grounds that a dissolution of a general partnership will be decreed, i. e. insanity or other incompetency of a partner, misconduct, or impossibility of conducting the business at a profit.[299]

Conveyance of Partner's Interest.

In the absence of contract or statutory provision to the contrary,[300] the conveyance of any partner's interest in a limited partnership works a dissolution, as in the case of a general partnership.[301] But in order to terminate liability, notice is necessary.[302] In the case of limited partnerships, such a conveyance would also be an alteration, and, as has been seen, if the business is thereafter carried on, the partnership, in most states, becomes general.[303] But if the special partner retires upon the alteration, unless he can be deemed a dormant partner, he must give notice, as in the case of a general partnership, in order to terminate his general liability;[304]

296 FLORIDA: McClel. Dig. 1881, c. 159, § 20. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 35. But see Hardt v. Levy, 72 Hun, 225, 25 N. Y. Supp. 248.

297 Richter v. Poppenhausen, 42 N. Y. 373; Walkenshaw v. Perzel, 32 How. Prac. (N. Y.) 233. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 14. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12.

298 Jacquin v. Buisson, 11 How. Prac. (N. Y.) 385; Mattison v. Demarest, 4 Rob. (N. Y.) 161. In case of limited partnership under the act of 1837 (Elmer, Dig. p. 376), the alteration caused by the death of a special partner affects only transactions carried on after such alteration, and does not affect prior debts or other transactions of the firm. Perth Amboy Manuf'g Co. v. Condit, 21 N. J. Law, 659.

299 See ante, p. 404.

300 See infra, note 306.

301 Wisner v. Ocumpaugh, 71 N. Y. 113; Fox v. Graham, Mich. N. P. 90; Beers v. Reynolds, 11 N. Y. 97.

302 Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610.

303 Ante, p. 468.

304 Buckley v. Lord, 24 How. Prac. (N. Y.) 455; Beers v. Reynolds, 11 N. Y.

and perhaps the statutory notice hereafter discussed would be necessary to terminate the remaining partner's power to bind the special partner to the extent of his contribution.[305]

Same—Statutory Provisions.

The following statutory provisions as to sales of a partner's interest are enforced in the states named in the notes: Any special partner or his legal representative may sell his interest in the partnership without working a dissolution thereof or rendering the partnership general, and the purchaser thereupon becomes a special partner, with the same rights as an original special partner.[306] But a notice of such sale must be filed or recorded and published with the original record.[307] And such partner making such sale must have the written assent of the other partners.[308] This consent may be given in advance in the original certificate of partnership or other like instrument.[309] A sale of a part interest or share may be made in the same way.[310] The general partners, or either of them, may purchase a part or the whole of the interest of one or more special partners.[311] A special partner may devise his interest.[312] The in-

97; Bulkley v. Marks, 15 Abb. Prac. (N. Y.) 454; Marshall v. Lambeth, 7 Rob. (La.) 471. As to notice by a general partner, see ante, p. 257. On an agreement to dissolve a limited partnership, the special partner took the general partner's notes in repayment of his special capital, and the firm was thereafter dissolved in the manner prescribed by statute. The notes were never paid. Held, that the special partner was not liable on a note given by the general partner, nearly three months after the dissolution, to a person who had not previously dealt with the firm. Waters v. Harris (Super. N. Y.) 17 N. Y. Supp. 370.

[305] Post, p. 491.

[306] KANSAS: Gen. St. 1889, par. 3989. MICHIGAN: How. Ann. St. 1882, § 2361. NEW JERSEY: Gen. St. 1895, "Partnership," § 26. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 32.

[307] KANSAS: Gen. St. 1889, par. 3989. MICHIGAN: How. Ann. St. 1882, §§ 2361, 2362. NEW JERSEY: Gen. St. 1895, "Partnership," § 26. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 12. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 31.

[308] KANSAS: Gen. St. 1889, par. 3989. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 32.

[309] PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 33.

[310] Id.

[311] Id.

[312] PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 35.

terest of a general partner may be sold in the same way.[313] The liability of the original partners remains unchanged, except as between each other, until the required certificate is filed and published.[314] A general partner in a limited partnership, with the written consent of his partners, by deed acknowledged and recorded, or by will, may sell, assign, or bequeath his interest in the partnership. So his executor or administrator may do so. A corresponding alteration must be made in the name of the firm.[315]

227. BY ACT OF PARTIES—No dissolution by the voluntary acts of the parties can take place previous to the time specified in the certificate, until a notice of such dissolution is filed and recorded, and also, in most states, duly published.

It is provided substantially, in the statutes of nearly all the states, that no dissolution of a partnership by the acts of the parties can take place previous to the time specified for its termination in the certificate of its formation or renewal, until a notice of such dissolution is filed and recorded in the office in which the original certificate was recorded.[316] In some statutes the wording is,

[313] MICHIGAN: How. Ann. St. 1882, § 2361.

[314] MICHIGAN: How. Ann. St. 1882, § 2363. And see Beers v. Reynolds, 12 Barb. (N. Y.) 288; Fanshawe v. Lane, 16 Abb. Prac. (N. Y.) 71. Under the twenty-fourth section of the statute of New York in regard to limited partnerships (1 Rev. St. p. 767), requiring notice of dissolution, previous to the time specified in the certificate of its formation, to be published "once in each week, for four weeks," the day of the week which is taken for the first publication must be taken for each of the subsequent publications. In re King, 5 Ben. 453, 7 N. B. R. 279, Fed. Cas. No. 7,779.

[315] PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 31.

[316] ALABAMA: Code 1886, § 1729. ARKANSAS: Sand. & H. Dig. 1894, § 5471. CALIFORNIA: Civ. Code 1886, § 2509. COLORADO: Mills' Ann. St. 1891, § 3381. DAKOTA: Comp. Laws 1887, § 4096. DELAWARE: Rev. Code 1893, c. 64, § 8. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 30. FLORIDA: McClel. Dig. 1881, c. 159, § 19. GEORGIA: Code 1882, § 1943. IDAHO: Rev. St. 1887, § 3293. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 12. INDIANA: Rev. St. 1894, § 8120. IOWA: McClain's Code 1888, § 3353. KANSAS: Gen. St. 1889, par. 3996. MAINE: Rev. St. 1883, c. 33, § 9. MARYLAND: Code 1888, art. 73, § 21. MASSACHUSETTS:

"no dissolution except by operation of law" and in others as above given, that "no dissolution by the acts of the parties can take place until," etc. The meaning in both cases is the same. In most states such notice must also be duly published for the prescribed time.[317] Mr. Bates is of the opinion,[318] which is probably correct,

Pub. St. 1882, c. 75, § 10. MICHIGAN: How. Ann. St. 1882, § 2359. MINNESOTA: Gen. St. 1894, § 2350. MISSISSIPPI: Code 1892, § 2777. MISSOURI: Rev. St. 1889, § 7205. MONTANA: Civ. Code 1895, § 3342. NEBRASKA: Comp. St. 1893, c. 65, § 24. NEVADA: Gen. St. 1885, § 4916. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 10. NEW JERSEY: Gen. St. 1895, "Partnership," § 24. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 24. NORTH CAROLINA: Code 1883, § 3108. NORTH DAKOTA: Rev. Code 1895, § 4440. OHIO: Rev. St. 1892, § 3159. OREGON: 2 Hill's Ann. Laws 1892, § 3856. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 30. RHODE ISLAND: Gen. Laws 1896, c. 157, § 13. SOUTH CAROLINA: Rev. St. 1893, § 1428. TENNESSEE: Mill. & V. Code 1884, § 2421. TEXAS: Rev. St. 1895, art. 3605. UTAH: Comp. Laws 1888, § 2493. VERMONT: St. 1894, § 4285. VIRGINIA: Code 1887, § 2875. WASHINGTON: Gen. St. 1891, § 2925. WEST VIRGINIA: Code 1891, c. 100, § 11. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1723. WYOMING: Rev. St. 1887, § 4092.

[317] COLORADO: Mills' Ann. St. 1891, § 3381. DAKOTA: Comp. Laws 1887, § 4096. DELAWARE: Rev. Code 1893, c. 64, § 8. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, § 30. GEORGIA: Code 1882, § 1943. IDAHO: Rev. St. 1887, § 3293. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 12. INDIANA: Rev. St. 1894, § 8120. KANSAS: Gen. St. 1889, par. 3996. KENTUCKY: St. 1894, c. 94, § 3777. MAINE: Rev. St. 1883, c. 33, § 9. MASSACHUSETTS: Pub. St. 1882, c. 75, § 10. MICHIGAN: How. Ann. St. 1882, § 2359. MISSOURI: Rev. St. 1889, § 7205. NEVADA: Gen. St. 1885, § 4916. NORTH DAKOTA: Rev. Code 1895, § 4440. OREGON: 2 Hill's Ann. Laws 1892, § 3856. RHODE ISLAND: Gen. Laws 1896, c. 157, § 13. UTAH: Comp. Laws 1888, § 2493. VERMONT: St. 1894, § 4285. VIRGINIA: Code 1887, § 2875. WASHINGTON: Gen. St. 1891, § 2925. WEST VIRGINIA: Code 1891, c. 100, § 11. WYOMING: Rev. St. 1887, § 4092. The publication must be once a week for four weeks: ARKANSAS: Sand. & H. Dig. 1894, § 5471. FLORIDA: McClel. Dig. 1881, c. 159, § 19. GEORGIA: Code 1882, § 1943. IOWA: McClain's Code 1888, § 3353. MARYLAND: Code 1888, art. 73, § 21. MINNESOTA. Gen. St. 1894, § 2350. NEBRASKA: Comp. St. 1893, c. 65, § 24. NEW HAMPSHIRE: Gen. Laws 1878, c. 118, § 10. NEW JERSEY: Gen. St. 1895, "Partnership," § 24. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 24. NORTH CAROLINA: Code

[318] Lim. Partn. § 141.

that this provision of the statute relates solely to the sufficiency of the notice as between the special partners and the creditors, and that a general partner who desires to protect himself against the acts of other general partners must give the notice of dissolution required in the case of general partnerships, and cannot rely upon this statutory notice for protection from future liability. The statutory notice merely protects the fund of the special partner from further dealings by the general partner.

SAME—CHANGE FROM LIMITED TO GENERAL LIABILITY.

228. A dissolution in the sense of a termination of limited liability, and the substitution of liability as general partners, occurs in the case of withdrawal, alteration, or interference.

We have seen that the penalty in most cases for a "withdrawal," "alteration," or "interference" contrary to the statute, is liability thereafter as a general partner.[319] In such case the limited partnership is dissolved or terminated, but a relation of general partnership exists between the members, unless terminated by proper steps, including notice. This subject has been sufficiently discussed under the respective heads of withdrawal, alteration, or interference.

ACTIONS—BETWEEN MEMBERS.

229. Actions between members of a limited partnership are subject to substantially the same rules as apply to actions between members of a general partnership.

1883, § 3108. OHIO: Rev. St. 1892, § 3159. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 30. TEXAS: Rev. St. 1895, art. 3605. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1723. For three weeks: ALABAMA: Code 1886, § 1729. MONTANA: Rev. St. 1879, div. 5, § 953. For three months: SOUTH CAROLINA: Rev. St. 1893, § 1428. For thirty days: MISSISSIPPI: Code 1892, § 2777.

[319] See ante, pp. 463, 468, 472.

Thus, though a special partner may claim as a creditor, yet he cannot maintain an action at law to recover his debt.[320] The rule that prevails in general partnerships prevails here also.[321] The action would involve a partnership accounting.

SAME—BETWEEN FIRM AND THIRD PERSONS.

230. Actions between the firm and third persons may be brought by and against the general partners only.

The statutes very generally provide that all suits respecting the business of the partnership shall be brought by and against the general partners in the same manner as if there were no special partners.[322] It is usually also provided that in cases where the

[320] Ward v. Newell, 42 Barb. (N. Y.) 482; Battaille v. Battaille, 6 La. Ann. 682. Cf. Pusey v. Dusenbury, 75 Pa. St. 437; Weller v. Wood, 6 Kulp (Pa.) 526. Although it be conceded that no action at law will lie between partners to recover moneys accruing to either in the actual conduct of the co-partnership business, yet it seems that such action at law might be sustained, upon the co-partnership articles, to enforce express stipulations by one to the others. Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221.

[321] See ante, p. 304.

[322] ALABAMA: Code 1886, § 1719. ARKANSAS: Sand. & H. Dig. 1894, § 5461. CALIFORNIA: Civ. Code 1886, § 2492. COLORADO: Mills' Ann. St. 1891, § 3380. CONNECTICUT: Gen. St. 1888, § 3284. DAKOTA: Comp. Laws 1887, § 4085. DELAWARE: Rev. Code 1893, c. 64, § 7. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, §§ 18, 26. FLORIDA: McClel. Dig. 1881, c. 159, § 10. GEORGIA: Code 1882, § 1933. IDAHO: Rev. St. 1887, § 3282. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 17. INDIANA: Rev. St. 1894, § 8119. IOWA: McClain's Code 1888, § 3343. KANSAS: Gen. St. 1889, par. 3995. KENTUCKY: St. 1894, c. 94, § 3778. MAINE: Rev. St. 1883, c. 33, § 8. MARYLAND: Rev. Code 1888, art. 73, § 19. MASSACHUSETTS: Pub. St. 1882, c. 75, § 9. MICHIGAN: How. Ann. St. 1882, § 2358. MINNESOTA: Gen. St. 1894, § 2343. MISSISSIPPI: Code 1892, § 2778. MISSOURI: Rev. St. 1889, § 7206. MONTANA: Civ. Code 1895, § 3313. NEBRASKA: Comp. St. 1893, c. 65, § 14. NEVADA: Gen. St. 1885, § 4915. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 11. NEW JERSEY: Gen. St. 1895, "Partnership," § 14. NEW YORK: Rev. St. (9th Ed.) pt. 2, c. 4, tit. 1, § 14. NORTH CAROLINA: Code 1883, § 3101. NORTH DAKOTA: Rev. Code 1895, § 4429. OHIO: Rev. St. 1892, § 3161. OREGON: 2 Hill's Ann. Laws 1892, § 3855. PENNSYLVANIA: Pepper & L. Dig. 1894, "Limited Partnership," § 20. RHODE ISLAND: Gen. Laws 1896, c. 157, § 12. That a sur-

statute provides that the special partners shall be deemed general partners, and that special partnerships shall be deemed general partnerships, the special partners may join or be joined.[323] In most states such joinder is optional.[324] So, in a number of states, where it is sought to hold the special partner liable for sums with-

viving general partner cannot be sued jointly with the executor of a deceased special partner, see Richter v. Poppenhausen, 42 N. Y. 373. The provision of the statute that suits in relation to the business of a limited partnership "may be brought and conducted by and against the general partners, in the same manner as if there were no special partners," must be construed to mean, not only that they may be thus brought "in the same manner," but "with the same effect." Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553. A judgment against a limited partnership, on which execution was returned unsatisfied, will not estop plaintiff from suing the members on the ground that they are liable as general partners, because the law providing for the formation of limited partnerships was not complied with. Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397.

[323] COLORADO: Mills' Ann. St. 1891, § 3380. CONNECTICUT: Gen. St. 1888, § 3284. DELAWARE: Rev. Code 1893, c. 64, § 7. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, §§ 18, 26. FLORIDA: McClel. Dig. 1881, c. 159, § 10. GEORGIA: Code 1882, § 1933. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 17. INDIANA: Rev. St. 1894, § 8119. KENTUCKY: St. 1894, c. 94, § 3778. MAINE: Rev. St. 1883, c. 33, § 8. MARYLAND: Code 1888, art. 73, § 19. MASSACHUSETTS: Pub. St. 1882, c. 75, § 9. MICHIGAN: How. Ann. St. 1882, § 2358. MINNESOTA: Gen. St. 1894, § 2343. SOUTH CAROLINA: Rev. St. 1893, § 1420. TENNESSEE: Mill. & V. Code 1884, § 2412. TEXAS: Rev. St. 1895, art. 3596. UTAH: Comp. Laws 1888, § 2486. VERMONT: St. 1894, § 4284. VIRGINIA: Code 1887, § 2876. WASHINGTON: Gen. St. 1891, § 2924. WEST VIRGINIA: Code 1891, c. 100, § 12. WISCONSIN: Sanb. & B. Ann. St. 1889, § 1718. WYOMING: Rev. St. 1887, § 4081. Cf. Howland v. Bethune, 13 U. C. Q. B. 270. MISSISSIPPI: Code 1892, § 2778. MISSOURI: Rev. St. 1889, § 7206. MONTANA: Rev. St. 1879, div. 5, § 952. NEVADA: Gen. St. 1885, § 4915. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 11. OHIO: Rev. St. 1892, § 3161. OREGON: 2 Hill's Ann. Laws 1892, § 3855. RHODE ISLAND: Gen. Laws 1896, c. 157, § 12. SOUTH CAROLINA: Rev. St. 1893, §§ 1420, 1431. VERMONT: St. 1894, § 4284. VIRGINIA: Code 1887, § 2876. WASHINGTON: Gen. St. 1891, § 2924. WEST VIRGINIA: Code 1891, c. 100, § 12. When a limited partnership expires, the partners become general partners if the business is continued; and therefore, where articles of limited partnership had expired, it was proper to bring an action in the name of the individual partners, and not in the name of the partnership. Sarmiento v. The Catherine C. (Mich.) 67 N. W. 1085.

[324] COLORADO: Mills' Ann. St. 1891, § 3380. DELAWARE: Rev. Code

drawn, it is provided that he may be joined.[325] In Mississippi, suits may also be brought against all the partners, general or special, without discrimination, and the latter may plead separately; or any special partner may be sued separately.[326] The provision authorizing actions against the general partners alone does not apply, of course, where it is sought to hold the special partner liable generally, even in the absence of the specific provisions above noted.[327] So, where the suit seeks the subversion of the partnership,

1893, c. 64, § 7. DISTRICT OF COLUMBIA: Comp. St. 1894, c. 43, §§ 18, 26. FLORIDA: McClel. Dig. 1881, c. 159, § 10. GEORGIA: Code 1882, § 1933: ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 17. INDIANA: Rev. St. 1894, § 8119. KENTUCKY: St. 1894, c. 94, § 3778. MAINE: Rev. St. 1883, c. 33, § 8. MARYLAND: Rev. Code 1888, art. 73, § 19. MASSACHUSETTS: Pub. St. 1882, c. 75, § 9. MICHIGAN: How. Ann. St. 1882, § 2358. MINNESOTA: Gen. St. 1894, § 2343. MISSISSIPPI: Code 1892, § 2778. MISSOURI: Rev. St. 1889, § 7206. MONTANA: Rev. St. 1879, div. 5, § 952. NEVADA: Gen. St. 1885, § 4915. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 11. OHIO: Rev. St. 1892, § 3161. RHODE ISLAND: Gen. Laws 1896, c. 157, § 12. SOUTH CAROLINA: Rev. St. 1893, §§ 1420, 1431. VERMONT: St. 1894, § 4284. VIRGINIA: Code 1887, § 2876. WEST VIRGINIA: Code 1891, c. 100, § 12.

[325] COLORADO: Mills' Ann. St. 1891, § 3380. DELAWARE: Rev. Code 1893, c. 64, § 7. GEORGIA: Code 1882, § 1933. ILLINOIS: 2 Starr & C. Ann. St. 1896, c. 84, § 17. INDIANA: Rev. St. 1894, § 8119. MARYLAND: Code 1888, art. 73, § 19. MASSACHUSETTS: Pub. St. 1882, c. 75, § 9. MICHIGAN: How. Ann. St. 1882, § 2358. MINNESOTA: Gen. St. 1894, § 2343. MONTANA: Rev. St. 1879, div. 5, § 952. NEVADA: Gen. St. 1885, § 4915. NEW HAMPSHIRE: Pub. St. 1891, c. 122, § 7. OREGON: 2 Hill's Ann. Laws 1892, § 3855. RHODE ISLAND: Gen. Laws 1896, c. 157, § 12. VERMONT: St. 1894, § 4284. WASHINGTON: Gen. St. 1891, § 2924. Where a defendant, sued as a surviving general partner, alleges in his answer, by way of avoidance, that the partnership was a limited one, formed as prescribed by statute, plaintiffs should reply, and point out the specific violation of the statute on which they rely to charge defendant as a general partner. Williams v. Kilpatrick, 21 Abb. N. C. 61. Where, in an action seeking to charge a special partner as a general partner, it appears from plaintiff's allegations and proofs that a limited partnership was duly formed, the burden is upon plaintiff to show the facts rendering defendant liable as a general partner, and defendant need not affirmatively prove the due formation of the partnership, or subsequent compliance with the law. Continental Nat. Bank of Boston v. Strauss (Super. N. Y.) 17 N. Y. Supp. 188, affirmed 137 N. Y. 148, 553, 32 N. E. 1066.

[326] Code 1892, § 2779.

[327] Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; Artisans' Bank v. Treadwell,

the special partners must be joined. In both cases the special partner has a right to be heard. "It seems to be giving an unreasonable latitude of construction to the words, 'Suits in relation to the business of the partnership may be by or against the general partners,' to apply them to a suit brought for the subversion of the partnership."[328] Accordingly, a special partner is a necessary party to an action by a partner or creditor for a dissolution, a receiver, and an accounting.[329] The above statutory provisions do not apply to actions between the partners.[330]

34 Barb. (N. Y.) 553; Haggerty v. Taylor, 10 Paige (N. Y.) 261. Under 1 Rev. St. p. 765, § 8, providing that, if the contribution by the special partner is not paid in cash, "all the persons interested in such partnership shall be liable for all the engagements thereof as general partners," the liability of a special partner survives after his death. First Nat. Bank of Jersey City v. Huber, 75 Hun, 80, 26 N. Y. Supp. 961.

328 Schulten v. Lord, 4 E. D. Smith (N. Y.) 206, 208.

329 Walkenshaw v. Perzel, 32 How. Prac. (N. Y.) 233; Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; McArthur v. Chase, 13 Grat. (Va.) 683.

330 See Spalding v. Black, 22 Kan. 53. A member of a limited partnership may sue the firm on a note indorsed by it. MacGeorge v. Manufacturing Co., 141 Pa. St. 575, 21 Atl. 671.

CHAPTER XI.

JOINT-STOCK COMPANIES.

231. In General.
232. Transfer of Shares.
233–234. Powers of Members and Officers.
235–236. Rights and Liabilities of Members inter Se.
237. Liability of Members to Third Persons.
238–239. Actions by and against Joint-Stock Companies.
240. Dissolution of Joint-Stock Companies.

IN GENERAL

231. Joint-stock companies are associations intermediate between partnerships and corporations. They may exist at common law or under local statutes.

TRANSFER OF SHARES.

232. The share of a member of a joint-stock company may be transferred subject to the following conditions, inter alia:

(a) Transfer does not dissolve the company.

(b) The assignee becomes a partner without the consent of the company unless otherwise provided.

(c) The retiring member must give notice to terminate his liability.

The essential feature of a joint-stock company is the absence of the delectus personæ. The capital of such associations is divided into shares which are transferable, and the transfer of one member's share or part of it does not dissolve the partnership. Usually, the transferee is entitled to admission into the company without the consent of the other members. But the articles of association may be so drawn that the consent of the members or the directors is necessary to entitle the transferee to participate in the management

of the company. In such case, if consent was not given, the transferee can still claim his share of the profits.[1]

The transfer by a member of all his shares does not relieve him of liability for the existing liabilities of the association, nor for obligations subsequently incurred, unless he gives notice of his retirement from the company.[2] The same principles apply here as in cases of ordinary partnerships where a partner retires.[3] The incoming member is not liable for debts existing at the time he becomes a member unless he expressly assumes them.[4] Joint-stock companies, with transferable shares, are legal at common law.[5] The English "Bubble Act,"[6] which prohibited joint-stock companies, has been held never to have been in force in this country.[7] Although certain formalities may be required by the articles of association for the transfer of a share, such as a certificate in writing filed with the secretary, an assignment without these formalities is, nevertheless, valid and sufficient to transfer the assignor's interest.[8]

POWERS OF MEMBERS AND OFFICERS.

233. Members of a joint-stock company have the same powers as members of an ordinary partnership.

234. When the business of a joint-stock company is managed by officers, these officers have the ordinary powers of partners, in the absence of restriction brought to the notice of the persons dealing with the company.

The mere fact that the shares of the members of a joint-stock company are transferable does not affect the powers of the members to conduct the business like ordinary partners, and to bind the

1 Kingman v. Spurr, 7 Pick. (Mass.) 235; Harper v. Raymond, 3 Bosw. (N. Y.) 29.

2 Tyrrell v. Washburn, 6 Allen (Mass.) 466; Tenney v. Protective Union, 37 Vt. 64. But see Bodey v. Cooper, 82 Md. 625, 34 Atl. 362.

3 See ante, p. 261.

4 Lake v. Munford, 4 Smedes & M. (Miss.) 312.

5 Phillips v. Blatchford, 137 Mass. 510.

6 6 Geo. I. c. 18.

7 Phillips v. Blatchford, 137 Mass. 510.

8 Alvord v. Smith, 5 Pick. (Mass.) 232.

company by their acts and contracts. When the members of a joint-stock company are numerous, and the articles provide for the carrying on of the affairs of the company by means of officers, the officers have such implied powers as partners have.[9] But an officer would have no power to execute sealed instruments for the company,[10] unless he was specially authorized to do so. In this or in any other case the articles of association might confer more extensive powers on the officers than those implied by law, or they might impose restrictions, but such restrictions would not affect persons having no notice of them.[11] The powers of members of joint-stock companies which are managed by officers are practically the same as those of stockholders of corporations. The members of such companies have no implied power to act for the company.[12]

RIGHTS AND LIABILITIES OF MEMBERS INTER SE.

235. The rights and liabilities inter se of members of joint-stock companies are the same as in an ordinary partnership, in the absence of changes introduced by the articles of association.

236. A member is not entitled to compensation from the company without a special agreement.

Articles of partnership which make the shares transferable do not by that alone affect the rights and liabilities of the members to each other. If the articles do not provide for the division of profits and losses, the rules of ordinary partnerships apply.[13] So,

[9] Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Bodwell v. Eastman, 106 Mass. 525; Tappan v. Bailey, 4 Metc. (Mass.) 529; Batty v. Adams Co., 16 Neb. 44, 20 N. W. 15; Cameron v. Bank (Tex. Civ. App.) 34 S. W. 178. A sale of the company's whole property would be ultra vires. Carter v. Oil Co., 164 Pa. St. 463, 30 Atl. 391.

[10] Skinner v. Dayton, 19 Johns. (N. Y.) 513.

[11] See ante, p. 215. Cf. Park Bros. & Co. v. Harwi, 2 Kan. App. 629, 42 Pac. 939; Interstate Mut. Fire Ins. Co. v. Brownback, 1 Pa. Super. Ct. 183.

[12] Pittsburgh Melting Co. v. Reese, 118 Pa. St. 355, 12 Atl. 362; Greenwood's Case, 3 De Gex, M. & G. 459.

[13] See ante, p. 138, and Kellogg Bridge Co. v. U. S., 15 Ct. Cl. 111.

too, as to other rights and liabilities.[14] The managing partners or officers must conduct the affairs of the company in the utmost good faith.[15] They are not entitled to any compensation beyond their share in the profits of the business, unless there is an agreement to that effect.[16]

LIABILITY OF MEMBERS TO THIRD PERSONS.

237. The members of joint-stock associations are liable for the whole amount of the indebtedness of the company. Statutes in some states create partnership associations with limited liability.

The liability in solido which has been seen to be a feature of partnerships[17] applies to joint-stock companies as well. Each member of such a company is personally liable for the whole amount of the company's obligations.[18] In some states statutes provide for the formation of joint-stock companies with limited liability of the members.[19] These companies are usually termed "partnership associations, limited." Similar companies with limited liability are common in England, and are called "joint-stock companies"; but the addition of a limitation on liability to a company having transferable shares makes an association more closely related to a cor-

[14] As to forfeiture of a share, see Walker v. Ogden, 1 Biss. 287, Fed. Cas. No. 17,081; Morris v. Land Co., 164 Pa. St. 326, 30 Atl. 240.

[15] In re Fry, 4 Phila. (Pa.) 129.

[16] In re Fry, 4 Phila. (Pa.) 129; Holmes v. Higgins, 1 Barn. & C. 74. But see Spence v. Whitaker, 3 Port. (Ala.) 297.

[17] Ante, p. 249.

[18] Tappan v. Bailey, 4 Metc. (Mass.) 529; Whitman v. Porter, 107 Mass. 522; Taft v. Ward, 106 Mass. 518, 111 Mass. 518, 522; Hodgson v. Baldwin, 65 Ill. 532; First Nat. Bank of Green Bay v. Goff, 31 Wis. 77; Gorman v. Russell, 14 Cal. 531; Savage v. Putnam, 32 Barb. (N. Y.) 420; Holt v. Blake, 47 Me. 62; Greenup v. Barbee's Ex'r, 1 Bibb (Ky.) 320; Cameron v. Bank (Tex. Civ. App.) 34 S. W. 178. For an unsuccessful attempt to limit liability by contract, see Hess v. Werts, 4 Serg. & R. (Pa.) 356. But the estate of a deceased member is not liable for debts contracted after his death. Bodey v. Cooper, 82 Md. 625, 34 Atl. 362.

[19] Bates, Lim. Partn. § 208 et seq. See Robbins Electric Co. v. Weber, 172 Pa. St. 635, 34 Atl. 116.

poration than to a partnership,[20] and, as such, not properly within the scope of this work.

ACTIONS BY AND AGAINST JOINT-STOCK COMPANIES.

238. In the absence of statutes, actions must be brought by and against joint-stock companies in the same manner as actions by and against ordinary partnerships.

239. In some states, statutes provide that such a company may be sued in its own nane or in the name of some officer.

Where there are no statutes making provision for joint-stock companies, the rules as to actions by and against partnerships already discussed apply.[21] In actions by a joint-stock company, all the members must be joined as parties plaintiff; and in actions against such a company all the partners must be made defendants, or those who are sued can prove a nonjoinder.[22] In a number of states, however, there are statutory provisions to the effect that a joint-stock company may be treated as a person in the courts, and allowed to sue or be sued in its own name, or in the name of some officer, usually the president or treasurer.[23] These statutes generally contain another provision to the effect that the property of the company shall be first exhausted, before resort is had to the individual property of the members. Under statutes of this kind, joint-stock companies become very much like corporations, and the

20 Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

21 Ante, p. 362.

22 Birmingham v. Gallagher, 112 Mass. 190; Kingsland v. Braisted, 2 Lans. (N. Y.) 17; Niven v. Spickerman, 12 Johns. (N. Y.) 401; Chick v. Trevett, 20 Me. 462; McGreary v. Chandler, 58 Me. 537.

23 New York: Code Civ. Proc. §§ 1919–1922. Wisconsin: Sanb. & B. Ann. St. 1889, § 3210. Cf. Adams Exp. Co. v. State (Ohio Sup.) 44 N. E. 506. In some states, however, companies organized under such statutes in another jurisdiction are required to sue or be sued as partnerships. Taft v. Ward, 106 Mass. 518; Gott v. Dinsmore, 111 Mass. 45. But see Edgeworth v. Wood (N. J. Sup.) 33 Atl. 940.

rules governing actions by and against corporations are in a large measure applicable. This is especially true in actions between the company and one of its members.[24] But between the individual members of a joint-stock company the usual rules as to actions between partners are applicable.[25]

DISSOLUTION OF JOINT-STOCK COMPANIES.

240. Joint-stock companies are dissolved in the following ways:

(a) By mutual consent.

(b) By decree of a court of equity.

Inasmuch as joint-stock companies in their usual form have no delectus personarum, the causes which dissolve an ordinary partnership because of that principle[26] do not dissolve a joint-stock company. Thus, it is usually provided in the articles of association that the death of a member shall not cause a dissolution,[27] nor the transfer of a share.[28] The termination of the company may be provided for in the articles of association; and, when this is the case, the company is dissolved in the manner and at the time agreed upon.[29] The members of a joint-stock company may, of course, dissolve the company by mutual consent; and an abandonment of the business may amount to a dissolution.[30] A court of equity may decree the dissolution of a joint-stock company[31] where the object

24 Fargo v. McVicker, 55 Barb. (N. Y.) 437; Waterbury v. Express Co., 50 Barb. (N. Y.) 157.

25 See Butterfield v. Beardsley, 28 Mich. 412; Morrissey v. Weed, 12 Hun (N. Y.) 491; Crater v. Bininger, 45 N. Y. 545; McMahon v. Rauhr, 47 N. Y. 67.

26 See ante, p. 396.

27 Phillips v. Blatchford, 137 Mass. 510; Walker v. Wait, 50 Vt. 668; McNeish v. Oak Co., 57 Vt. 316; Tenney v. Protective Union, 37 Vt. 64.

28 Kahn v. Smelting Co., 102 U. S. 641; Skillman v. Lachman, 23 Cal. 199; Taylor v. Castle, 42 Cal. 367; Settembre v. Putnam, 30 Cal. 490; Duryea v. Burt, 28 Cal. 569.

29 Mann v. Butler, 2 Barb. Ch. (N. Y.) 362. Cf. Lake v. Munford, 4 Smedes & M. (Miss.) 312.

30 Allen v. Clark, 65 Barb. (N. Y.) 563; Hewett v. Hatch, 57 Vt. 16.

31 As to the power of one or more members to institute proceedings for a dissolution, see Snyder v. Lindsey (Sup.) 36 N. Y. Supp. 1037.

of the organization has been abandoned,[32] or has become impossible;[33] but the mismanagement of the directors or trustees of such a company is not cause for a decree of dissolution.[34]

[32] Burke v. Roper, 79 Ala. 138.
[33] Von Schmidt v. Huntington, 1 Cal. 55.
[34] Waterbury v. Express Co., 50 Barb. (N. Y.) 157.

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